

# Questionnaire for the public consultation on a New Competition Tool

Fields marked with \* are mandatory.

## Introduction

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### Objectives of the public consultation

The proposal for a New Competition Tool is one of the measures aimed at making sure that competition policy and rules are fit for the modern economy. It is meant to address gaps in the current EU competition rules, which have been identified based on the Commission's enforcement experience in digital and other markets, as well as the worldwide reflection process about the need for changes to the current competition law framework to allow for enforcement action preserving the competitiveness of markets.

EU competition law can address (i) anti-competitive agreements and concerted practices between companies pursuant to Article 101 of the Treaty on the Functioning of the European Union ("the EU Treaty") and (ii) the abuse by a company of its dominant position pursuant to Article 102 of the EU Treaty. The enforcement experience of the Commission and national competition authorities, as well as the worldwide reflection process on the fitness of the existing competition rules to tackle today's challenges have helped to identify certain structural competition problems that these rules cannot tackle (e.g. monopolisation strategies by non-dominant companies with market power) or cannot address in the most effective manner (e.g. strategies by companies with market power to extend their market position into multiple related markets).

The objective of this consultation is to collect stakeholder views on two aspects. First, stakeholders are asked to provide their views on whether there is a need for a new competition tool to ensure fair and competitive markets with a view to delivering lower prices and higher quality, as well as more choice and innovation to European consumers. Second, stakeholders are asked to provide their views on the characteristics that such a new competition tool should have in order to address structural competition problems in a timely and effective manner.

In parallel, the Commission is also engaged in a process of exploring, in the context of the Digital Services Act package, 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. As part of that process, the Commission has launched a consultation to seek views on the framing, on the scope, the specific perceived problems, and the implications, definition and parameters for addressing possible issues deriving from the economic power of large, digital gatekeeper platforms. As such, the work on a proposed New Competition Tool and on the ex ante rules complement each other. The work on the two impact assessments will be conducted in parallel in order to ensure a coherent outcome. In

this context, the Commission will take into consideration the feedback received from both consultations. We would therefore invite you, in preparing your responses to the questions below, to also consider your response to the parallel consultation on ex ante rules for large, digital gatekeeper platforms, which can be found at [Digital Services Act survey](#).

## About you

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\* Language of my contribution

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ Gaelic
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

\* I am giving my contribution as

- ☐ Academic/research institution
- ☐ Business association

- ☐ Company/business organisation
- ☐ Consumer organisation
- ☐ EU citizen
- ☐ Environmental organisation
- ☐ Non-EU citizen
- ☐ Non-governmental organisation (NGO)
- ☐ Public authority
- ☐ Trade union
- ☒ Other

\* First name

Ief

\* Surname

Daems

\* Email (this won't be published)

ief.daems@inhousecompetitionlawyers.com

\* Organisation name

*255 character(s) maximum*

Association of In-House Competition Lawyers, ICLA

\* Organisation size

- ☐ Micro (1 to 9 employees)
- ☐ Small (10 to 49 employees)
- ☐ Medium (50 to 249 employees)
- ☒ Large (250 or more)

\* Web address

www.inhousecompetitionlawyers.com

Transparency register number

*255 character(s) maximum*

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

## \* Country of origin

Please add your country of origin, or that of your organisation.

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|---|--|--|--|
| <input type="radio"/> Afghanistan         | <input type="radio"/> Djibouti           | <input type="radio"/> Libya            | <input type="radio"/> Saint Martin                     |
| <input type="radio"/> Åland Islands       | <input type="radio"/> Dominica           | <input type="radio"/> Liechtenstein    | <input type="radio"/> Saint Pierre and Miquelon        |
| <input type="radio"/> Albania             | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania        | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria             | <input type="radio"/> Ecuador            | <input type="radio"/> Luxembourg       | <input type="radio"/> Samoa                            |
| <input type="radio"/> American Samoa      | <input type="radio"/> Egypt              | <input type="radio"/> Macau            | <input type="radio"/> San Marino                       |
| <input type="radio"/> Andorra             | <input type="radio"/> El Salvador        | <input type="radio"/> Madagascar       | <input type="radio"/> São Tomé and Príncipe            |
| <input type="radio"/> Angola              | <input type="radio"/> Equatorial Guinea  | <input type="radio"/> Malawi           | <input type="radio"/> Saudi Arabia                     |
| <input type="radio"/> Anguilla            | <input type="radio"/> Eritrea            | <input type="radio"/> Malaysia         | <input type="radio"/> Senegal                          |
| <input type="radio"/> Antarctica          | <input type="radio"/> Estonia            | <input type="radio"/> Maldives         | <input type="radio"/> Serbia                           |
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| <input type="radio"/> Argentina           | <input type="radio"/> Ethiopia           | <input type="radio"/> Malta            | <input type="radio"/> Sierra Leone                     |
| <input type="radio"/> Armenia             | <input type="radio"/> Falkland Islands   | <input type="radio"/> Marshall Islands | <input type="radio"/> Singapore                        |
| <input type="radio"/> Aruba               | <input type="radio"/> Faroe Islands      | <input type="radio"/> Martinique       | <input type="radio"/> Sint Maarten                     |
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| <input type="radio"/> Azerbaijan          | <input type="radio"/> France             | <input type="radio"/> Mayotte          | <input type="radio"/> Solomon Islands                  |
| <input type="radio"/> Bahamas             | <input type="radio"/> French Guiana      | <input type="radio"/> Mexico           | <input type="radio"/> Somalia                          |
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<input type="radio"/> Bangladesh	<input type="radio"/> French Southern and Antarctic Lands	<input type="radio"/> Moldova	<input type="radio"/> South Georgia and the South Sandwich Islands
<input type="radio"/> Barbados	<input type="radio"/> Gabon	<input type="radio"/> Monaco	<input type="radio"/> South Korea
<input type="radio"/> Belarus	<input type="radio"/> Georgia	<input type="radio"/> Mongolia	<input type="radio"/> South Sudan
<input checked="" type="radio"/> Belgium	<input type="radio"/> Germany	<input type="radio"/> Montenegro	<input type="radio"/> Spain
<input type="radio"/> Belize	<input type="radio"/> Ghana	<input type="radio"/> Montserrat	<input type="radio"/> Sri Lanka
<input type="radio"/> Benin	<input type="radio"/> Gibraltar	<input type="radio"/> Morocco	<input type="radio"/> Sudan
<input type="radio"/> Bermuda	<input type="radio"/> Greece	<input type="radio"/> Mozambique	<input type="radio"/> Suriname
<input type="radio"/> Bhutan	<input type="radio"/> Greenland	<input type="radio"/> Myanmar /Burma	<input type="radio"/> Svalbard and Jan Mayen
<input type="radio"/> Bolivia	<input type="radio"/> Grenada	<input type="radio"/> Namibia	<input type="radio"/> Sweden
<input type="radio"/> Bonaire Saint Eustatius and Saba	<input type="radio"/> Guadeloupe	<input type="radio"/> Nauru	<input type="radio"/> Switzerland
<input type="radio"/> Bosnia and Herzegovina	<input type="radio"/> Guam	<input type="radio"/> Nepal	<input type="radio"/> Syria
<input type="radio"/> Botswana	<input type="radio"/> Guatemala	<input type="radio"/> Netherlands	<input type="radio"/> Taiwan
<input type="radio"/> Bouvet Island	<input type="radio"/> Guernsey	<input type="radio"/> New Caledonia	<input type="radio"/> Tajikistan
<input type="radio"/> Brazil	<input type="radio"/> Guinea	<input type="radio"/> New Zealand	<input type="radio"/> Tanzania
<input type="radio"/> British Indian Ocean Territory	<input type="radio"/> Guinea-Bissau	<input type="radio"/> Nicaragua	<input type="radio"/> Thailand
<input type="radio"/> British Virgin Islands	<input type="radio"/> Guyana	<input type="radio"/> Niger	<input type="radio"/> The Gambia
<input type="radio"/> Brunei	<input type="radio"/> Haiti	<input type="radio"/> Nigeria	<input type="radio"/> Timor-Leste
<input type="radio"/> Bulgaria	<input type="radio"/> Heard Island and McDonald Islands	<input type="radio"/> Niue	<input type="radio"/> Togo
<input type="radio"/> Burkina Faso	<input type="radio"/> Honduras	<input type="radio"/> Norfolk Island	<input type="radio"/> Tokelau
<input type="radio"/> Burundi	<input type="radio"/> Hong Kong	<input type="radio"/> Northern Mariana Islands	<input type="radio"/> Tonga
<input type="radio"/> Cambodia	<input type="radio"/> Hungary	<input type="radio"/> North Korea	<input type="radio"/> Trinidad and Tobago

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| <input type="radio"/> Cameroon                 | <input type="radio"/> Iceland     | <input type="radio"/> North Macedonia  | <input type="radio"/> Tunisia                              |
| <input type="radio"/> Canada                   | <input type="radio"/> India       | <input type="radio"/> Norway           | <input type="radio"/> Turkey                               |
| <input type="radio"/> Cape Verde               | <input type="radio"/> Indonesia   | <input type="radio"/> Oman             | <input type="radio"/> Turkmenistan                         |
| <input type="radio"/> Cayman Islands           | <input type="radio"/> Iran        | <input type="radio"/> Pakistan         | <input type="radio"/> Turks and Caicos Islands             |
| <input type="radio"/> Central African Republic | <input type="radio"/> Iraq        | <input type="radio"/> Palau            | <input type="radio"/> Tuvalu                               |
| <input type="radio"/> Chad                     | <input type="radio"/> Ireland     | <input type="radio"/> Palestine        | <input type="radio"/> Uganda                               |
| <input type="radio"/> Chile                    | <input type="radio"/> Isle of Man | <input type="radio"/> Panama           | <input type="radio"/> Ukraine                              |
| <input type="radio"/> China                    | <input type="radio"/> Israel      | <input type="radio"/> Papua New Guinea | <input type="radio"/> United Arab Emirates                 |
| <input type="radio"/> Christmas Island         | <input type="radio"/> Italy       | <input type="radio"/> Paraguay         | <input type="radio"/> United Kingdom                       |
| <input type="radio"/> Clipperton               | <input type="radio"/> Jamaica     | <input type="radio"/> Peru             | <input type="radio"/> United States                        |
| <input type="radio"/> Cocos (Keeling) Islands  | <input type="radio"/> Japan       | <input type="radio"/> Philippines      | <input type="radio"/> United States Minor Outlying Islands |
| <input type="radio"/> Colombia                 | <input type="radio"/> Jersey      | <input type="radio"/> Pitcairn Islands | <input type="radio"/> Uruguay                              |
| <input type="radio"/> Comoros                  | <input type="radio"/> Jordan      | <input type="radio"/> Poland           | <input type="radio"/> US Virgin Islands                    |
| <input type="radio"/> Congo                    | <input type="radio"/> Kazakhstan  | <input type="radio"/> Portugal         | <input type="radio"/> Uzbekistan                           |
| <input type="radio"/> Cook Islands             | <input type="radio"/> Kenya       | <input type="radio"/> Puerto Rico      | <input type="radio"/> Vanuatu                              |
| <input type="radio"/> Costa Rica               | <input type="radio"/> Kiribati    | <input type="radio"/> Qatar            | <input type="radio"/> Vatican City                         |
| <input type="radio"/> Côte d'Ivoire            | <input type="radio"/> Kosovo      | <input type="radio"/> Réunion          | <input type="radio"/> Venezuela                            |
| <input type="radio"/> Croatia                  | <input type="radio"/> Kuwait      | <input type="radio"/> Romania          | <input type="radio"/> Vietnam                              |
| <input type="radio"/> Cuba                     | <input type="radio"/> Kyrgyzstan  | <input type="radio"/> Russia           | <input type="radio"/> Wallis and Futuna                    |
| <input type="radio"/> Curaçao                  | <input type="radio"/> Laos        | <input type="radio"/> Rwanda           | <input type="radio"/> Western Sahara                       |
| <input type="radio"/> Cyprus                   | <input type="radio"/> Latvia      | <input type="radio"/> Saint Barthélemy | <input type="radio"/> Yemen                                |

- ☐ Czechia
- ☐ Lebanon
- ☐ Saint Helena  
Ascension and  
Tristan da  
Cunha
- ☐ Zambia
- ☐ Democratic  
Republic of the  
Congo
- ☐ Lesotho
- ☐ Saint Kitts and  
Nevis
- ☐ Zimbabwe
- ☐ Denmark
- ☐ Liberia
- ☐ Saint Lucia

### \* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

#### ☐ **Anonymous**

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

#### ☒ **Public**

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

☒ I agree with the [personal data protection provisions](#)

## A. How to answer?

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You are invited to reply to this public consultation **by 8 September 2020** by filling out the eSurvey questionnaire online. The questionnaire consists of four main sections:

1. General information on the respondent
2. Structural competition problems: this section aims to gather the experience and views of stakeholders on scenarios resulting in a structural lack of competition and structural risks for competition, as well as about whether the current EU competition rules can deal with them.
3. Assessment of policy options: this section aims to gather the views of stakeholders on the four policy options outlined in the Inception Impact Assessment.
4. Institutional set-up of a new competition tool: the section aims to gather the views of stakeholders about how the new competition tool should be shaped in order to address structural competition problems in a timely and effective manner.

The Commission will summarise the **results in a report**, which will be made publicly available on the Commission's [Better Regulation Portal](#).

In the interest of time, the questionnaire is available in English only during the first two weeks. Thereafter the questionnaire will also be available in all official EU languages. You may respond to the questionnaire in any official EU language.

To facilitate the analysis of your reply, we would kindly ask you to **keep your answers concise** and to the point. You may include documents and URLs for relevant online content in your replies. **You are not required to answer every question**. You may respond 'not applicable/no relevant experience or knowledge' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to allow the Commission to gather solid evidence on the different aspects covered by this questionnaire.

You are invited to read **the privacy statement attached** to this consultation for information on how your personal data and contribution will be dealt with.

You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this you have to click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.

Whenever there is a text field for a short description, you may answer in **maximum 3000 characters**.

Questions marked with an asterisk (\*) are **mandatory**.

**Digital markets** in this questionnaire refer to markets largely relying on digital technologies with certain specific characteristics, such as extreme economies of scale and scope, strong network effects, zero pricing and data dependency.

No statements, definitions, or questions in this public consultation may be interpreted as an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

In case you have questions, you can contact us via the following functional mailbox: [COMP-NEW-COMPETITION-TOOL@EC.EUROPA.EU](mailto:COMP-NEW-COMPETITION-TOOL@EC.EUROPA.EU);

If you encounter technical problems, please contact the Commission's [CENTRAL HELPDESK](#).

**\* 1. Please indicate your role for the purpose of this consultation.**

- ☐ An individual citizen
- ☐ An association or trade organisation representing consumers
- ☐ An association or trade organisation representing businesses
- ☐ An association or trade organisation representing civil society
- ☐ A business / economic operator of small size
- ☐ A business / economic operator of medium size
- ☐ A business / economic operator of large size
- ☐ A public authority
- ☐ A research institution / Think tank



- ☐ Academia (Legal field)
- ☐ Academia (Economics)
- ☐ Academia (Engineering)
- ☐ Academia (Other)
- ☐ Law firm / consultancy
- ☒ Other: Optional

Please explain.

*100 character(s) maximum*

Association of inhouse competition lawyers incl. more than 450 members in their personal capacity

**\* 2. Only for businesses / economic operators: Please identify the markets /sectors in which you provide your services.**

- ☐ A - Agriculture, forestry and fishing
- ☐ B - Mining and quarrying
- ☐ C - Manufacturing
- ☐ D - Electricity, gas, steam and air conditioning supply
- ☐ E - Water supply; sewerage; waste management and remediation activities
- ☐ F - Construction
- ☐ G - Wholesale and retail trade; repair of motor vehicles and motorcycles
- ☐ H - Transporting and storage
- ☐ I - Accommodation and food service activities
- ☐ J - Information and communication
- ☐ K - Financial and insurance activities
- ☐ L - Real estate activities
- ☐ M - Professional, scientific and technical activities
- ☐ N - Administrative and support service activities
- ☐ O - Public administration and defence; compulsory social security
- ☐ P - Education
- ☐ Q - Human health and social work activities
- ☐ R - Arts, entertainment and recreation
- ☐ S - Other services
- ☒ T - I am not a business/economic operator
- ☐ Other

**\* 3. Please briefly explain your activities/describe your organisation/company and - if applicable - the main goods/services you provide.**

*3000 character(s) maximum*

The In-House Competition Lawyers' Association ("ICLA") is an informal association of in-house competition lawyers across Europe and in South East Asia. There are currently more than 450 members based in different countries around the globe. The Association does not represent companies but is made up of individuals as experts in the area of competition law. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward competition law regime that prioritises legal certainty, minimises costs, and does not represent a disproportionate demand on businesses' time and resources. This submission represents the position of ICLA, and does not necessarily represent the views of all of its individual members.

**\* 4. Only for businesses / economic operators: Does your company provide digital goods or services?**

- ☒ I am not a business operator/representative of businesses
- ☐ No
- ☐ Not applicable
- ☐ Yes, I am active as an e-commerce marketplace
- ☐ Yes, I operate an app store
- ☐ Yes, I develop and provide apps
- ☐ Yes, I provide a search engine
- ☐ Yes I provide an operating system
- ☐ Yes I provide a social network
- ☐ Yes, I provide network and/or data infrastructure/cloud services
- ☐ Yes, I provide digital identity services
- ☐ Other

Please specify

*3000 character(s) maximum*

**\* 4.1. Please explain your answer. Please indicate what types of digital goods or services you provide. If you replied 'no', please indicate if you expect to provide digital goods or services in the next five years.**

*3000 character(s) maximum*

See our response to Q1 above.

**5. Only for business / economic operators: As a business user, do you rely on digital services or on digital operators and/or online platforms? (For the purposes of this questionnaire 'online platform' refers to a firm operating in two (or multi)-sided markets, which uses the Internet to enable interactions**

**between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.)**

- ☐ Yes, my business is fully dependent on digital operators and/or online platforms
- ☐ Yes, my business is largely dependent on digital operators and/or online platforms
- ☐ Yes, my business is somewhat dependent on digital operators and/or online platforms
- ☐ No
- ☐ Not applicable / no relevant experience or knowledge
- ☒ I am not a business operator/representative of businesses

**5.1. If yes, please describe those digital services you use. If no, please explain why you do not use digital services, and whether you expect/plan to rely on them in the next five years.**

*3000 character(s) maximum*

## C. Structural competition problems

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Structural competition problems concern structural market characteristics that have adverse consequences on competition and may ultimately result in inefficient market outcomes in terms of higher prices, lower quality, less choice and innovation. These market characteristics (explained in more detail below) include extreme economies of scale and scope, strong network effects, zero pricing and data dependency, as well as market dynamics favouring sudden and radical decreases in competition ('tipping') and 'winner-takes-most' scenarios. These characteristics can typically be found in digital but also in other markets.

As the Commission has established in some of its competition decisions, these characteristics can make a position of market power or dominance, once acquired, difficult to contest.

While structural competition problems can arise in a broad range of different scenarios, they can be generally grouped into two categories depending on whether harm is about to affect or has already affected the market:

- **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 markets concerned 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.

The questions in this section aim to gather information on the types of market characteristics that may result in structural competition problems, and on gaps in Articles 101 and 102 of the EU Treaty, in order to understand the most appropriate scope for a new competition tool. (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.)

**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)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
C - High start-up costs (i.e. non-recurring costs associated with setting up a business)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
E - Regulatory barriers ('Regulatory barriers' refer to regulatory rules that make market entry or expansion more cumbersome or extensively expensive)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
F - Importance of patents or copyrights that may prevent entry	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
H - High customer switching costs ('Switching costs' are one-time 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)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
I - Lack of access to a given input/asset which is necessary to compete on the market (e.g. access to data)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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)					
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)					
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)					
M - Customers typically use one platform (i.e. they predominantly single-home) and cannot easily switch					
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)					
O - Significant financial strength					
P - Zero-pricing markets ('Zero-price 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))					
Q - Data dependency ('Data dependency' refers to scenarios where the operation of 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.)



**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



**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.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Highly concentrated markets where only one or few players are present, which allows to align their market behaviour.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* The widespread use of algorithmic pricing that allows easily to align prices.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Gatekeeper scenarios: situations where customers typically predominantly use one service provider/platform (single-home) and therefore the market dynamics are only determined by the gatekeeper.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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.)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

*5000 character(s) maximum*

Given ICLA's broad and diverging membership, we will focus on responding to Section D and E. We are not able to provide a response to Q6, Q7, or the following questions of this section. To the extent any answers are provided for this Section C, they have only been provided as it is required to respond to the question in order to make a submission.

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

- ☐ Yes  
☒ No

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

**\* 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

**\* 9.2. 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.**

*3000 character(s) maximum*

Please see our response to questions 24.1 and 25.1 below.

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 situation?

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

\* 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

\* 11.2. Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective to address anti-competitive monopolisation?

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

\* 11.3. Please explain your answer.

*3000 character(s) maximum*

Please see our response to questions 24.1 and 25.1 below.

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

\* **12.4. Can you think of any other features of an oligopolistic market with a high /substantial risk of tacit collusion?**

- ☐ Yes  
☒ No

\* **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

\* **13.2. 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.**

*3000 character(s) maximum*

Please see our response to questions 24.1 and 25.1 below.

**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.

\* **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

\*

**15.2. 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.**

*3000 character(s) maximum*

Please see our response to questions 24.1 and 25.1 below.

**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

**\* 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.

**\* 17.2. 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.**

*3000 character(s) maximum*

Please see our response to questions 24.1 and 25.1 below.

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

**\* 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

**\* 19.2. 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.**

*3000 character(s) maximum*

Please see our response to questions 24.1 and 25.1 below.

**\* 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

**\* 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

**\* 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.**

*3000 character(s) maximum*

Please see our response to questions 24.1 and 25.1 below.

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

*3000 character(s) maximum*

n/a

**\* 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 type of conduct and situations that in your view, Article 102 of the EU Treaty does not sufficiently or effectively address, and why.**

*3000 character(s) maximum*

Please see our response to questions 24.1 and 25.1 below.

**\* 23.2. Please explain in which markets the market situations and problematic conducts you have identified manifest themselves.**

*3000 character(s) maximum*

n/a

## **D. Assessment of policy options**

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The questions in this section seek to gather feedback on the policy options outlined in the [Inception Impact Assessment](#).

**\* 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.**

*3000 character(s) maximum*



ICLA strongly believes that there is no need for a NCT.

Structural competition problems that may exist should be addressed via the existing tools under Art 101 and 102 TFEU. The Commission should focus on breaches of competition law. It should not be able to circumvent the required standards of proof, by seeking to remedy situations for which it is not able to show an infringement. Where necessary, the existing competition law framework could be improved and updated to address potential issues or enforcement hurdles (see Q25.1 below) – without however creating an additional enforcement tool.

However, if the Commission is convinced that (i) there are serious structural competition problems; (ii) such competition problems cannot be addressed based on current tools; and (iii) a NCT is required to address those concerns, ICLA believes the following safeguards are essential:

- The NCT should be used in exceptionally rare circumstances only and limited to address the types of serious 'structural competition problems' the Commission believes need to be addressed
- The Commission must identify the specific features of a given market or type of behaviour that have to be present in order to commence an investigation under the NCT
- Any proposal should lay out the standard of proof that the Commission must meet before starting an investigation. This is necessary to ensure legal certainty for businesses. Such standard should be based on a reasonable theory of harm
- Any proposal should set out clear procedures with appropriate checks and balances and rights of defence. It should be subject to strict time limits. Under the NCT, companies might find themselves subject to an investigation without having breached the law. See Q34.1 below
- Given the potential significant impact of a NCT process, the Commission should consider creating a 'pre-investigation' stage. Only if and when such review results in the finding of a structural competition problem that the Commission believes cannot be addressed through Art 101 or 102 TFEU, an NCT investigation should start. Such 'pre-investigation' phase should run separately from the actual 'investigation' phase
- Companies in a market under investigation must have ample opportunity to express their views throughout the process as well as the right to be heard by the decision-makers
- Throughout the process, the Commission should remain open-minded, and be willing to close the investigation if it does not find structural competition problems that could not be addressed through regular 101/102 TFEU enforcement
- A final decision should only include non-binding recommendations to policy-makers or sectorial regulators. It could also lead to voluntary commitments offered by the targeted companies. It should not include imposing (structural) remedies. See Q30.1 below
- A full judicial review procedure before the EU Courts is needed to ensure the respect of the rights of defence and create legal certainty. See Q39.1 below

**\* 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.**

As mentioned in Q24.1, ICLA believes there is no need for any New Competition Tool to address or prevent any potential structural competition problems.

The Commission can use its existing wide-ranging powers under Regulation 1/2003 to tackle competition problems. The existing tools could be applied more efficiently, and if the Commission believes that there are competition concerns that it cannot address under the current framework, and that need to be addressed, it should focus on improving the application and effectiveness of the current toolbox – through the ongoing reviews of the Market Definition Notice, the Horizontal and Vertical Block Exemption Regulations and Guidelines, as well as the consultations around potential new legislative measures. One should carefully assess the impact of those changes, before seeking to introduce a tool that could have wide-ranging and significant impact on businesses. These investigations are costly and create great uncertainty on the market as well as issues of legal certainty.

Furthermore, ICLA does not believe that Art 103 and 114 TFEU form a valid legal basis for the NCT, which would mean that the Commission's initiative is lacking any sound foundation in law:

- Art 103 allows the enactment of laws to give effect to the principles set out in Art 101 and 102 TFEU, but it does not allow new competition enforcement powers that go beyond these principles. Art 101 and 102 define the scope of antitrust enforcement, and secondary legislation cannot exceed this pre-defined scope.

- Art 114 concerns the harmonization of national laws of the Member States that hinder free movement of goods, services, capital or people and therefore obstruct the internal market. There is, however, no danger that a UK-style system (imposition of remedies post sector inquiry) is hindering the internal market. In the UK itself, there are very few cases, mostly related with national markets such as supermarkets, and the UK is exiting the EU. The other two countries that have legislation providing for a similar system (Romania and Greece) do not have any enforcement practice that can provoke fear that the internal market is being disrupted.

- Given the far-reaching nature of the new enforcement tool, the appropriate legal basis for any NCT seems to be Art 352, which would require the full support of all Council members and involvement of the national parliaments.

Finally, while the 'Market Investigation' tool that exists in the UK may serve as inspiration for designing the new tool, there are several checks and balances in the UK which would be difficult to replicate in a different legal system (such as an independent panel taking the decision). The existence at national level of a market investigation tool should not be used as a justification for the introduction of an NCT at the European level, in a different legal environment, and with markets across Europe that could present very different characteristics.

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

3000 character(s) maximum

As mentioned in response to Question 24.1. and 25.1. above, we do not consider that there are any structural problems that should be tackled by a New Competition Tool.

**\* 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.**

*3000 character(s) maximum*

Please see our response to Question 24.1. and 25.1. above.

**\* 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.**

*3000 character(s) maximum*

Please see our response to Question 24.1. and 25.1. above.

**\* 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.**

*3000 character(s) maximum*

Due to its broad membership, ICLA does not take a position on whether there are any potential structural competition law concerns or about the sectors in which potential competition issues may arise. That being said, if the Commission were to introduce a new tool, a number of principles should be considered to ensure sufficient checks and balances are in place – see our response to Questions 24.1. and 25.1. above).

**\* 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?**

*3000 character(s) maximum*

As ICLA we are not addressing specific sectors or industries. However, it goes without saying that any new tools or regulation should complement, and not conflict with, existing sector-specific legislation.

**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)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* • Inform and make recommendations/proposals to sectorial regulators	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* • Inform and make legislative recommendations	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* • Impose remedies on companies to deal with identified and demonstrated structural competition problems	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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

*3000 character(s) maximum*

Please see our earlier response to Question 24.1. above.

As mentioned above, a final decision should at most be about making non-binding recommendations to policy-makers or sectorial regulators, or accepting during the process voluntary commitments offered by the companies. It would be improper to have more intrusive measures when no breach of law has been found. More specifically, without proof of a competition law violation, any tool should not impose structural remedies as they can have drastic consequences for companies, potentially even more intrusive than fines. Furthermore, imposing structural remedies might constitute a violation of fundamental rights (e.g., freedom of enterprise and of ownership) and therefore require a proper legal basis and a special justification. Such justification may not be available for the circumstances and the facts that the Commission may be seeking to address.

While we do not consider that the Commission should be able to impose remedies through any new NCT, we do believe that if the Commission were to have such power, the Commission must make sure that at least the same procedural safeguards are in place as those applicable to an Art 101/102 TFEU infringement procedure.

**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)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* • Structural remedies (for instance, divestitures or granting access to key infrastructure or inputs)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* • Hybrid remedies (containing different types of obligations and bans)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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

*3000 character(s) maximum*

Please see our earlier response to Question 24.1.

**\* 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

**32.1. Please explain your answer.**

*3000 character(s) maximum*

Please see our earlier response to Questions 24.1 and 30.1 above.  
Any New Competition Tool that is meant to allow the Commission to intervene outside the scope of Art 101 and 102 TFEU to address certain market behaviour should be limited to making non-binding recommendations to policymakers or sectorial regulators, or accept voluntary measures offered unilaterally by the targeted companies. Such process must respect fundamental rights and ensure a proper debate where all the issues can be considered.

## **E. Institutional set-up of a new competition tool**

The questions in this section seek feedback on what features and set-up the new competition tool should have.

**\* 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.**

*3000 character(s) maximum*

As mentioned above, ICLA does not believe it is appropriate to introduce a New Competition Tool. However, if the Commission were to decide otherwise, we do agree that enforcement of any New Competition Tool would require adequate and appropriate investigation power for that tool to be effective.

**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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Imposing penalties for not replying to requests for information	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Imposing penalties for providing incomplete or misleading information in reply to requests for information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* The power to interview company management and personnel	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Imposing penalties for not submitting to interviews	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* The power to obtain expert opinions	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* The power to carry out inspections at companies	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Imposing penalties for not submitting to inspections at companies	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**\* 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.**

*3000 character(s) maximum*

Dawn raids are intrusive measures and supposed to be carried out only when a competition authority believes that a company might be in breach of competition law rules. Taking into account that any New Competition Tool would be an “ex-ante” intervention without there being any indication of a violation of competition rules, it is not appropriate to allow for the possibility to carry out inspections at the premises of targeted companies (or their representatives).

As far as requests for information are concerned, the Commission currently sends out many requests on a so-called ‘informal’ basis, under Art 18.1 Regulation 1/2003. Especially against the background that any NCT procedure would be run in the absence of a competition law violation, it seems most appropriate to focus on such ‘informal’ questionnaires – and certainly limit as much as possible the power the Commission may have to issue formal questionnaires (such as those referred to in Art 18.2 Regulation 1/2003).

In terms of the power to obtain independent expert opinions, relevant industry participants should be given ample opportunity to provide factual information and share their expertise – which may include industry studies or reports or input provided by independent experts in the field. However, given the nature of the procedure, we believe this input should be provided voluntarily by the relevant industry participants, which are best placed to talk about relevant market dynamics.

Interviews with company management and personnel may be key to allow a targeted company to provide additional context and clarify the accuracy of the facts. However, ‘compelling’ companies to be submitted to such interviews may be a very intrusive measure for the type of investigation we are talking about (i.e. without there being any indications of a competition law violation).

We refer to our response to Question 24.1. above for key principles that should be taken into account were the Commission to decide to introduce a New Competition Tool.

**\* 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.**

*3000 character(s) maximum*

As mentioned, ICLA is not in favour of introducing a NCT for the reasons mentioned above. However, if this new tool were adopted, it would be of utmost importance to set clear legal deadlines. Such deadlines should give adequate legal certainty and clarity to companies that operate in the market/s that are investigated. Furthermore, as long procedures can end up being a costly exercise in terms of time and resources for companies under investigation, it is important that the duration of such investigations is limited to what is necessary for the Commission to come to an informed but swift decision. If one of the outcomes is to propose legislative changes, then the issue can be further debated in front of policy makers. While parties should have adequate time to respond to any requests for information, prepare for hearings, or respond to any potential allegations, it is at the same time also important for the Commission to take sufficient time to gather information about the features of the targeted market and understand the relevant market dynamics. The Commission should take these factors into account when deciding on the appropriate deadlines. On balance, it does not seem unreasonable to argue that the Commission should seek to come to a resolution and conclusion within a time period of less than 18 months if its role is to make non-binding recommendations or legislative proposals.

**\* 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.**

*3000 character(s) maximum*

The use of interim measures should be reserved for use by the Commission in cases of an ex-post intervention in an antitrust investigation for a potential breach of competition rules under Art 101 or 102 TFEU. In these cases, the Commission should carry out a case-by-case assessment to decide whether to impose interim measures and limit such measures in time. In addition, the imposing of such interim measures must require a proper investigation and the existence of a prima facie illegal behaviour. Giving the Commission the possibility to introduce such measures in the absence of a potential breach of competition law would not only fall outside the scope of Art 8 of Regulation 1/2003, it is also a very intrusive measure that would leave businesses in extreme uncertainty and could cause irreparable harm. It is of relevance that interim measures are not available in the UK to the CMA when they carry out a market investigation and it has been considered as improper the use of such power in this context.

**\* 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.**

*3000 character(s) maximum*

Please see our earlier response to Question 24.1.

**\* 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.**

*3000 character(s) maximum*

Please see our earlier response to Question 24.1.

**\* 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.**

*3000 character(s) maximum*

As mentioned above, ICLA does not consider that it would be appropriate for the Commission to impose remedies in this type of investigations. However, in case the Commission seeks to impose non-binding recommendations, or the relevant companies may seek to offer voluntary commitments, it would be helpful for the Commission to consult with relevant third parties in case those remedies would have a possible business impact on those parties. Such third-party consultations, if introduced, should however be streamlined to avoid as much as possible further delays in the procedure, or third parties abusing the process to obtain commercial gains.

**\* 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.**

*3000 character(s) maximum*

As mentioned in our response to Question 24.1 above, it is absolutely critical for any New Competition Tool to provide adequate procedural safeguards, including full judicial review. As mentioned, legal certainty would be key for any new tool the Commission may be considering. The process should also be subject to strict time limits. There is a severe risk of negative effects on markets if companies are caught up for long periods of time in investigations which would be document-intensive and where the potential outcome could slow or stop investment. Procedures need to be clearly defined, so that companies involved have a clear view of the relevant process, be given ample opportunity to provide factual input, and have the ability to respond to the Commission findings.

It would be important for the parties to be able to challenge the process and the outcome via a speedy review of the EU Courts. This would be particularly important if the Commission were granted powers to impose remedies to the companies affected. Furthermore, appeals should have suspensive effects, or at the very least it must be made clear that the affected party/parties have access to interim measure proceedings. In any potential New Competition Tool, the Commission should involve different internal departments that have expertise in the markets investigated (for instance, DG CONNECT for telecommunications or digital market investigations) and ensure that these departments can provide input throughout the process. The above safeguards are especially critical given the absence of a competition law violation by the companies under investigation, and the fact that the EU Commission does not have the additional safeguard, applied to UK CMA market investigations, of the appointment of an independent panel of experts, separate from the CMA investigatory team, to take the Decision. They are absolutely indispensable in the event that the Commission, contrary to ICLA's view, seeks to impose remedies including structural remedies on the companies investigated.

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

*3000 character(s) maximum*

Please see our response to Question 39.1. above.

## **F. Concluding questions and document upload**

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**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	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 5. There is a need for combination of two or more of the options 2 to 4.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

- \* 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.**

*3000 character(s) maximum*

Given ICLA's broad and diverging membership, we are not able to provide a response to this question.

**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.**

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

- \* 42. Do you have any further comments on this initiative on aspects not covered by the previous questions?**

*3000 character(s) maximum*

Not applicable. We thank the Commission for the opportunity to provide comments, and remain available to discuss any questions you may have.

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

- ☒ Yes  
☐ No

## Contact

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