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## Instrat and European Horizons' joint contribution to the EU consultations on the New Competition Tool (NCT)

Instrat and European Horizons appreciate the opportunity to comment on the European Commission's Inception Impact Assessment regarding the development of a New Competition Tool (NCT).

**Instrat** is a progressive think-tank focused on public policy advisory. We provide research and consult on digital economy, energy and environment, sustainable finance, labour market and inequalities. We act in the public interest, in our work we create and adapt open access & open source tools.

**European Horizons** is a global, student-led policy incubator committed to giving young people a voice in shaping the future of Europe and transatlantic relations. Through our network of university chapters across the world, and in collaboration with partner organizations, European Horizons devises, tests, and advocates for innovative policy ideas to advance European integration.

### **Executive Summary: New Competition Tool**

- Based on our argumentation below, we believe that the European Commission should be empowered through the New Competition Tool to effectively address the structural risk for competition (a tipping market) as well as the structural lack of competition (a failing market) in a regulatory capacity.
- The New Competition Tool should allow the European Commission to impose behavioral, and where necessary, structural remedies in order to prevent digital service providers from becoming gatekeepers, *ex ante*. Therefore, we recommend a market structure-based competition tool, as it — unlike a dominance-based tool — would not be limited to companies which have already acquired market dominance.
- Online platforms oftentimes leverage network effects and strong positions in one area of the digital economy to aggressively scale up new digital and non-digital services in adjacent markets such as advertising, financial services, housing, and cloud computing. Therefore, we recommend that the European Commission implement an NCT which is applicable across sectors and prohibits companies from exploiting conglomerate and

network effects. To achieve this, a competition tool with limited scope will not suffice. Instead, we recommend choosing a tool applying a horizontal scope.

- Consequently, Instrat and European Horizons strongly recommend implementing Option 3: **a market structure-based competition tool with a horizontal scope.**

## **Introduction**

The European Digital Strategy is presently foremost, after the European Green Deal, on the European Commission's policy agenda for a more integrated Europe. ICT has become a general purpose technology, affecting all sectors of the economy and also, fundamentally, the fabric of our societies. The growing divide between slow moving legislative and regulatory bodies and fast-paced technological innovation, combined with disruptive business models of the digital economy have created an amalgamation of complex and interdependent problems. In the context of this consultation document we will restrict ourselves to only mention the main issues related to competition and market structure.

- Online platforms act as gatekeepers and leverage an environment which allows for the monopolization of markets and thus an increasingly uneven playing field. This results in reduced social gains due to a sharp drop in research and development spendings, decreasing innovation and start-up competition.
- There is a lack of flexibility and applicability of existing competition laws and proper legal enforcement mechanisms in the digital economy on both the European and national level.

To support the existing European Digital Strategy, the above mentioned problems must be addressed through policy solutions and regulatory measures that will facilitate socially and economically beneficial development, both in the common internet and for the broader digital economy, all while deepening European integration. The European Single Market has helped transform the European continent into a global, economic heavyweight. Therefore, when the European Commission implements new regulations to counter tipping markets and market failures caused by oligopolistic and monopolistic multinational corporations, it must do so in a fair, robust, and intelligent manner. Only then can we hope to again witness the so-called Brussels effect: causing the world to follow where the European Commission leads.

## **General remarks on the NCT**

Not only has the evolution of the digital economy brought many benefits to consumers and entrepreneurs, but it has also made the digital economy a key driver for economic growth and productivity. Nevertheless, we observe that power in the digital market is concentrated in the

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hands of a minimal number of big players, due to unrealistically high barriers to market-entry. Online platforms increasingly act as gatekeepers. Markets dominated by gatekeeping platforms are characterised by

- extreme economies of scale and scope,
- strong network effects,
- zero pricing and data dependency,
- a swift blow to market competition, and
- a winner-takes-most reality.

Applying these five characteristics to any of the big tech companies already demonstrates the urgent need for a bold and dedicated change in policy.

The current legal framework is no longer adequate and leaves open opportunities for the violation of competition rules by companies dominant in digital markets. Therefore, it is vital to create a tool that complements the existing competition legislation and addresses the structural risk for competition (a market tips in favor of one dominant player) as well as the structural lack of competition (a market fails).

## **NCT legal basis**

### **Relationship with Articles 101 and 102 TFEU**

As was stated in the Inception Impact Assessment, the aim of the New Competition Tool is to resolve certain structural competition problems that are not addressed (e.g. monopolisation strategies by non-dominant companies with market power), or that cannot be addressed in the most effective manner (e.g. parallel leveraging strategies by dominant companies into multiple adjacent markets) by Articles 101 and 102 TFEU. As the idea of complementing the current framework is reasonable, one must bear in mind that introducing the NCT may lead to certain overlaps between the newly introduced tool and currently existing provisions. To avoid legal uncertainty in the new legislation, the European Commission should carefully scrutinize the relationship between Articles 101 and 102 TFEU and the NCT.

### **Basis of EU intervention**

Another concern is related to the legal basis of implementing the NCT. The Inception Impact Assessment indicates Article 103 TFEU in combination with Article 114 TFEU as a ground for the European Commission's intervention. However, the Article 103 TFEU clearly states that its aim is to enforce Articles 101 and 102 TFEU, while the goal of the NCT is to enable the European Commission to act without prior finding of any infringement of above-mentioned articles. The European Commission should therefore consider providing a more suitable legal basis to ensure effective enforcement of the NCT. This could be achieved by relying on the so-called *flexibility clause* described in Article 352 TFEU.

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## Legality test

The proposed NCT aims to tackle issues related to a structural risk for competition as well as issues resulting from a structural lack of competition. However, the Inception Impact Assessment does not precisely specify the requirements that need to be fulfilled to consider certain issues as structural competition problems. To ensure legal certainty and compliance with the rule of law, it is essential to introduce a test to determine whether there is a genuine need to apply the NCT. To avoid ambiguities in interpretation, the European Commission should establish clear guidelines and specify what precisely constitutes ‘a structural risk for competition’ and ‘a structural lack of competition.’ Without implementing such a test, the European Commission risks precipitating infringements and misuses of European law by bypassing standards provided by Articles 101 and 102 TFEU.

## Recommendations for the NCT

### Horizontal or limited scope of application

Online platforms such as Facebook and Google with its parent company Alphabet are fast-evolving enterprises that quickly adapt to different market conditions and the changing demands of consumers. Their ability to create and shape new business models based on the collection and processing of vast quantities of data allows them to rapidly expand in adjacent markets owing to complementarities inherent in the use of personal data, such as online advertising, telecommunication, or financial markets. The multidimensional nature of online platform activities combined with the growing popularity of digital services means that large technology firms often exert influence beyond areas strictly associated with the digital environment. As was noted by the European Commission in the Inception Impact Assessment, the line between digital and non-digital markets is increasingly blurred. A good example of how far-reaching this influence on non-digitally enabled markets can be is Airbnb and the issues related to its business model. While the platform is presenting itself as an intermediary between those who want to rent out space and those who are looking for space to rent, it has fundamentally changed the market structure of the accommodation industry by distorting competition in the hospitality sector.

Taking the above into account, we consider that relying on a tool limited only to certain digital or digitally-enabled markets would not suffice in overcoming current competition concerns related to the digital economy. Hence, we conclude that **it is preferable to adopt an instrument with a horizontal scope.**

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## **Market structure-based or dominance-based competition tool**

We strongly recommend the European Commission to introduce a market structure-based competition tool to overcome the shortcomings of a purely dominance-based tool. Implementing such a dominance-based tool would fundamentally undermine the NCT's mission of preventing *the creation of powerful market players with an entrenched market and/or gatekeeper position*, ex ante, as it would only be limited to online platforms which already have acquired market dominance. Additionally, a dominance-based tool would risk creating legislative redundancies in conjunction with Article 102 TFEU. Although the dominance-based NCT would allow the European Commission to address competition concerns without infringements on a dominant market position, the potential regulatory outcomes of a dominance-based NCT would not substantially differ from those reached through the existing legal framework.

The past has shown that competition investigations resulting in structural remedies of already dominant companies are often nothing more than a cost of doing business. Following long investigation processes, the European Union fined Google/Alphabet on the grounds of abuse of market power on three separate occasions. The fines amounted to a total of €8.2bn — a sum palling in comparison to Alphabet's *annual* profits of approximately €30bn.

Large online platforms are known for their ability to create entire ecosystems consisting of many actors functioning in various, separate sectors. In the most far-reaching cases, these ecosystems comprise operating systems, browser and other software, search engines, identity verification, e-commerce, e-mailing, maps, online ads, cloud computing, et cetera. There are even plans to add healthcare, autonomous vehicles, and satellite systems to such ever-growing tech conglomerates. These players are often vertically integrated and align their behaviour in a way that causes problems not necessarily related to their dominance. Namely, even if a company does not dominate in a specific market, its simultaneous presence in several interconnected markets can be detrimental to other independent market participants. Since smaller players may be subsidized by incomes obtained from other vertically integrated companies, they are able to maintain the highest standard of services and the broadest scope in their offerings. Consequently, even without apparent dominance, certain companies are capable of preventing competitors from entering in or emerging from a market. Equipped with deep financial pockets resulting from immense profits of their power houses (Google for Alphabet, Amazon Web Services for Amazon), buying up emerging competition is widespread. In the last decade alone, the five biggest tech companies acquired more than 400 start-ups all while facing only limited scrutiny by competition regulators.

The NCT should therefore address all structural competition concerns ex ante, and ought to include markets in which the respective company is not yet dominant but is likely to abuse competition nonetheless, eg. by creating oligopolistic market structures. Therefore, we

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recommend the European Commission to pursue a holistic approach by introducing **a market structure-based competition tool**.

### **Execution of the NCT**

To ensure the effectiveness of the NCT, it is essential to designate a new regulatory body responsible for detecting and eliminating infringements caused by digital platforms. As we observe, competition problems resulting from the growth of platform economies are substantially complex, and may be too problematic to be sufficiently tackled by existing regulators. Therefore, to take full advantage of the NCT, the European Commission, as well as the Member States, ought to consider introducing a regulatory body which will be designated to exercise tasks related strictly to digital markets (e.g. screening the digital market, monitoring platform behaviors, requesting non-personal data information).

The European Commission as well as Europe's citizens are right to view concentrated markets and lack of competition with suspicion. At the same time we acknowledge the risk of arbitrary decision-making by an all too powerful and unaccountable regulatory body.

### **Recommendation**

On the basis of the Inception Impact Assessment and consultation documents, we strongly recommend that the European Commission implement Option 3: **a market structure-based competition tool with a horizontal scope**.

We believe that the option addresses current competition concerns in the most comprehensive way, and allows regulators to take full advantage of ex ante instruments. However, we also urge the European Commission to take a closer look into possible overlaps of the NCT with the current competition law framework. Therefore, we recommend the European Commission to take the precautions necessary (e.g. to open further consultations on developing specific instruments) to avoid potential gaps and legal uncertainty.

Creating European champions has become a buzzword lately, not just in Brussels. However, we want to stress the importance that it should not be the goal of this New Competition Tool to artificially create our very own European Googles, Facebooks, and Amazons. The resulting issues would be as problematic and worrying as the ones we see today. As long as companies play by European rules it should not bother us whether they are based in the United States, in Europe or in Asia. Instead the goal must be to craft rules for a digital environment which allows for a plethora of companies, and thus ideas, to thrive without facing a tipping or failed market. We at Instrat and European Horizons strive for an internet that is not just of and by the people, but for the people.