Questionnaire for the Public Consultation on a New Competition Tool

Google's submission

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SECTION 1: Overview

Introduction

Google welcomes the opportunity to continue to engage with the European Commission concerning the possible ex ante regulation of platforms and the new competition tool (NCT). Google set out its initial views in respect of both instruments in its response to the Initial Impact Assessment (IIA) on June 30, 2020.

In this document, Google responds to the Commission's 'Questionnaire for the public consultation on a New Competition Tool'. It should be read alongside Google's response to the open public consultation regarding the Digital Services Act package and cross-references to that response are set out below where appropriate.

Google believes that there are opportunities for modernisation of the EU competition law framework. The proposed Digital Services Act and NCT have a role to play in that modernisation if properly designed and implemented.

In this response, we build upon the matters set out in our response to the IIA. We focus on the areas where the available evidence (from, e.g. regulatory practice, academic research and market developments) supports a measured, case-by-case approach to intervention. While recognising the ambition to impose significant, market-shifting regulatory changes, we recommend combining this ambition with an awareness of the costs and benefits of intervention.

We understand concerns that digitisation and market changes have challenged the ability of the existing competition framework to maintain competitive markets, and that there may be scope to modernise that framework. Some of the Commission's concerns are likely to fall within the scope of Articles 101 and/or 102 TFEU, though we have also identified additional areas that an NCT could address. To ensure more robust enforcement, we would also encourage adapting existing antitrust tools and procedures to allow assessments to be carried out more swiftly and effectively. This could be achieved, for example, through organisational and procedural changes that enable more efficient (and shorter) proceedings. Where needed, antitrust investigations could be fortified by targeted use of interim measures.

Google is particularly keen to ensure that regulation preserves the flexibility required to accommodate the dynamic and rapid evolution of the digital economy, while being targeted to areas where there have been shown to be material enforcement gaps. Our objective is to support the Commission to identify targeted, proportionate approaches for tackling specific concerns, while avoiding blanket new prohibitions and overlapping regulatory frameworks that would limit economically and socially beneficial innovation.

Google is committed to on-going innovation that delivers benefits to all users of Google's ecosystem: including both consumers and companies who utilise Google's products to serve the ever-changing needs of their own consumer base. As examples of the

pro-competitive innovation that we have been able to develop and deploy within the current landscape:

- In a number of EU countries Google is currently testing changes to its search results to provide third party vertical search services with enhanced visibility via choice carousels. These choice carousels list search services above specialised results for flights, hotels, local businesses, and jobs. In these carousels, Google shows links to search services, together with logos or images, in a scrollable horizontal row. These carousels give users additional choices without depriving them of the benefits of specialised results.

- Alongside its Chrome web browser, Google develops and maintains its Chromium open source offering. A broad range of developers use Chromium to design their own web-browsing capabilities. Not only is it utilised by established technology companies such as Microsoft (to power its Edge and Opera browsers) and Amazon (for its Silk browser), but it also provides a valuable platform for a broad range of innovative start-ups. Such firms offer products which plug market gaps and meet ever-changing user needs without having to incur the material investment costs involved in building a web browser from scratch.

These are only some examples of the pro-competitive innovation that large online platforms like Google have been able to develop and deploy within the current landscape. The coronavirus pandemic has encouraged thousands of EU businesses to accelerate their push towards digitalisation. This will only encourage further innovation; innovation we say the Commission should seek to protect. In that context, it is even more critical that the regulatory framework allows both for competition on the merits and for the rapid development of innovative services that can support this digitalisation.We look forward to continuing our constructive engagement with the Commission and would welcome the opportunity to comment on draft legislation.

The remainder of this response tracks the structure of the Commission's questionnaire, though we have grouped together questions which address common themes to avoid duplication.

Questions 1-5: Background information

Questions 1-5 request background on the respondent, including the extent to which the respondent provides digital goods or services and the extent to which it relies on online platforms.

Google is a multinational technology company, headquartered in Mountain View (California, USA), active in a wide range of product areas including, for example, online advertising technology, internet search, cloud computing, software, and hardware. As regards digital goods or services, Google is involved in the following activities identified at question 4 of the consultation: the operation of an app store; the development and provision of apps; the provision of a search engine; the provision of an operating system;

the provision of network and/or data infrastructure/cloud services; and the provision of digital identity services.

C. Structural Competition Problems

Questions 6-19: defining structural competition problems

Questions 6-19 seek views on the extent to which certain market features can contribute to structural competition problems / certain market scenarios can be described as structural competition problems.

Questions 8 through 19 set out more detailed questions on the following features / market structures / conduct, asking questions regarding the prevalence of such features, the markets in which they arise, examples of them having arisen, and the extent to which the existing competition tools can effectively address them:

- Companies with market power extending their market position into related markets (Qs 8-9)
- 'Anti-competitive monopolisation', including the imposition of unfair business practices or limiting access to key inputs such as data (Qs 10-11)
- Oligopolistic markets / tacit coordination (Qs 12-13)
- The use of pricing algorithms to align prices (particularly retail prices) (Qs 14-15)
- Tipping / 'winner takes most' markets (Qs 16-17)
- The presence of 'gatekeepers' (Qs 18-19)

Key messages:

- The Commission posits a broad list of market features and types of conduct that may constitute, or contribute to, structural competition problems. Depending on the circumstances, these can give rise to pro-competitive, anti-competitive or competition neutral results.
- Historic competition policy debates (e.g. regarding the so-called 'efficiency offence' in merger control or the treatment of 'patent pools' under Article 101 TFEU) demonstrate the need for case-by-case analysis where it is not immediately apparent whether the conduct in question is good or bad for competition, as here.
- The question of whether the proposed NCT is an appropriate tool to address the issues identified by the Commission, and whether there is a gap in the existing antitrust rules, turns on the specific conduct in question. Each category

identified by the Commission is assessed separately below.

The various market features and types of conduct identified by the Commission in Qs 6 and 7 of the consultation, depending on the circumstances, can give rise to pro-competitive, anti-competitive or competitively neutral results. Accordingly, these features and types of conduct do not lend themselves to *per se* rules: only evidence-driven case-by-case assessments, including where appropriate detailed economic modelling, can help determine whether such market features/types of conduct will lead to anti-competitive results.

For example, in the period leading up to the introduction of the 2004 Merger Regulation, there was debate as to the treatment of efficiencies in EU merger control, and in particular whether they were harmful to competition (as they could give large players scale and efficiency advantages that could not be matched, ultimately leading to a loss of competition) or pro-competitive (with merger-specific efficiencies serving to offset the anti-competitive effect of potentially problematic transactions). Today, it is one of the accepted principles of competition law that efficiencies are generally pro-competitive, both in merger control and under Article 101/102. However, this was not always the case.[1] Robust economic analysis was needed to inform the policy choice as to how to treat efficiencies, not the other way around.[2]

Indeed, in reference to digital platforms in particular, Alexiadis and de Streel noted in a recent paper that *"intervention is rendered even more complex because of the dynamic nature of competition in relation to such markets and the need to weigh ambiguous competing harms against potential distributional efficiencies, rather than reliance on the usual more static models of competitive harm."*[3]

The market scenarios posited in Q7 are considered in further detail below (Qs 8-9: companies with market power extending their market position into related markets; Qs 10-11: anti-competitive monopolisation; Qs12-13: oligopolistic markets / tacit coordination; Qs14-15: use of pricing algorithms to align prices; Qs 16-17: tipping / 'winner takes most' markets; and Qs 18-19: gatekeeper scenarios).

Some of the Commission's concerns are likely to fall within the scope of Articles 101 and/or 102 TFEU. Nevertheless, Google acknowledges that there may be opportunities for modernisation and improvement within the existing EU competition law framework, and that this may contribute to efficient and effective intervention.

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1 The Competition Commissioner Mario Monti rebuffed the idea of the 'efficiency offence' in a speech in 2002.

2 For a further example, see the debate regarding the treatment of 'patent pools' - see, e.g., Competition and the Industrial Challenge for the Digital Age, Jean Tirole, April 3, 2020.

3 Alexiadis, P. and de Streel, Alexandre, Designing an EU Intervention Standard for Digital Platforms (February 26, 2020). Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14.

Questions 8-9:Companies with market power extending their market position into related markets

Key messages:

- This potential concern can, in principle, arise in all markets, not just those which can be classified as 'digital' or 'digitised'. The key question is the nature of the entry/expansion and its impact on the market.
- EU Court jurisprudence (e.g. *Microsoft*) illustrates that the key issue is distinguishing between entry/expansion which delivers pro-competitive benefits (e.g. Google's map and weather results, as found by courts in England and Wales and Germany respectively) and that which produces only anti-competitive effects. Many cases will fall on a spectrum between the two. There is therefore a need for case-by-case analysis.
- Given the significant scope for positive or neutral effects for competition from this type of conduct, the Commission should exercise great caution before assigning any such conduct to a 'blacklist'.

Concerns about companies with market power extending dominance into new markets should not necessarily be limited to digital markets, as the Commission's and Courts' decisional practice shows. The central issues are whether (1) the expansion into the new market is achieved through competition on the merits (e.g. an improved product design) or anticompetitive conduct (e.g. coercive tying, margin squeeze, refusal to supply an indispensable input), and (2) the conduct causes anticompetitive foreclosure in the related market.[4]

Companies in the digital sector generally seek to offer innovative products to attract users to their services. Entry and/or expansion in a related market by a company with or without market power (whether as a one off or on a repeated basis) often results in product improvements that benefit consumers and customers. There is nothing inherently anti-competitive in offering a portfolio of complementary products. This can have material benefits to customers (both end consumers and other businesses who may utilise a portfolio of services from a third party to more effectively serve their own customers).

At the same time, we understand that, in some cases, these practices may also involve conduct that does not constitute competition on the merits and which forecloses efficient rivals.

[4] See, e.g. *Commercial Solvents, Cases 6 and 7/73; Magill, Case C-241/91 P; Hilti*, Case C-53/92 P; Tetra Pak, Case C-333/94 P; IMS Health, Case C-418/01; *Michelin II, OJ [2002] L 143/1;* Microsoft, Case T-201/04; *Deutsche Telekom, Case C-280-08*

For instance, in *Microsoft*,[5] the General Court found that "*the Commission does not interfere with Microsoft's business model in so far as that model includes the integration of a streaming media player in its client PC operating system or the possibility for that operating system to allow software developers and Internet site creators to take advantage of the benefits offered by the 'stable and well-defined' Windows platform*".[6] In other words, the General Court and the Commission were not impugning Microsoft's ability to introduce product improvements, including through vertical integration, to the mutual benefit of Microsoft and its customers. The Court and the Commission did however take issue with Microsoft making that improvement a "*de facto*" standard, rather than offering a choice of its Windows operating system with and without its Media Player, so as to "*stimulate innovation*".[7] Microsoft admitted that there was "*no technical reason*" for the tie. Nor did it adduce satisfactory evidence that integration "*creates technical efficiencies or, in other words, that it 'lead[s] to superior technical product performance*" so as to justify the lack of choice.[8] I.e. vertical integration based on ownership without sufficient demonstrable benefits to customers falls outside of competition on the merits.

Self-preferencing can be pro- or anti-competitive, depending on the circumstances and the nature of the self-preferencing at issue. There is a recognised risk that self-preferencing can unfairly advantage companies' own services at the expense of efficient rivals without offering adequate countervailing benefits to customers.

At the same time, certain practices that could be described as 'self-preferencing' have led to clear product improvements. For example, in *Streetmap*, the High Court of England & Wales found Google's practice of showing a map thumbnail at the top of search results pages to be "*procompetitive*" and an "*indisputable*" product improvement. Likewise, the Hamburg District Court found that Google's display of weather information at the top of search results for weather queries served "*to increase the overall attractiveness of [Google's] search engine*". This type of product integration creates a richer search experience and offers more relevant information thereby saving people time, improving discovery, and reducing search costs.

Similarly, the situation where a dominant company retains for its own use a non-indispensable asset, rather than sharing it with rivals, could be described as self-preferencing. But it is well recognised that it is procompetitive for companies to develop their own innovations, and use those innovations as the tools to compete against one another. As Advocate General Jacobs explained in *Bronner*: "*it is generally*

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5 *Ibid.*

6 *Microsoft, para 1150.*

7 *Microsoft, para 1151-1153.*

8 Microsoft, para 1159.

pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business."[9]

In previous competition assessments, the Commission has emphasized the need for "*case-specific analysis to account for the specific characteristics of each market*". Google believes that the continuing complexity and diversity of digital business models reinforces the importance of a case-specific approach to avoid significant unintended consequences. On the one hand, instances of self-preferencing deserve close scrutiny to ensure that competition and consumers are not being harmed; on the other hand, a blanket approach could deny users the benefits of innovation and product improvements without evidence that a corresponding harm is being addressed.

Presumptions of illegality for platform integrations would apply across a category of different firms, competing in different areas, engaged in many different forms of conduct. This could have several unintended consequences: hampering vertical integration, which is presumptively efficient; eliminating synergies; and leading to delayed or mothballed product improvements. Accordingly, to find practicable and constructive solutions to claims of unequal treatment, it's important to avoid abstract and one-size-fits-all rules.

Instead, concerns of unequal treatment should be assessed based on the facts of a particular case. For example, the following questions may be relevant to the assessment of a new product design: (i) Does the new design confer an undeserved advantage on the company? (ii) Does the design improve quality and benefit consumers (and has the company conducted testing to evidence the quality improvement)? (iii) Is the design a separate product, or part of the main product offered to consumers? (iv) Does the design restrict consumers from reaching rivals, or does it allow consumers to reach or choose rival services? (v) What is the competitive significance of the design?

Accordingly, a case-by-case assessment is always required to assess allegations about companies with market power entering new markets. Thus, the mere fact that a company may repeatedly enter new markets is not, of itself, problematic (contrary to the suggestion in Q8).

We acknowledge that currently the Commission cannot intervene either (i) where non-dominant companies are engaging in potentially anti-competitive leveraging, or (ii) *ex ante* where there is a sufficiently high risk of a dominant company engaging in such conduct in the future, as such cases fall outside the scope of Article 102 (and, if there is no agreement/concerted practice, are not caught by Article 101 either). There is, however, a sound principled basis for the scope of Articles 101 and 102. The quasi-criminal nature of any fines imposed means that a 'bad act' must have been committed prior to intervention and in that sense the tools are *ex post* only. Similarly, there is a reason that Article 102 only applies to dominant undertakings - the likelihood of unilateral conduct resulting in

[9] Case C-7/97, Opinion, para 57.

anti-competitive outcomes increases with the degree of market power of the relevant undertaking.

Accordingly, in designing any new rules, the Commission should carefully consider how such new rules could accommodate and facilitate the necessary case-specific analysis, and how best to avoid anti-competitive outcomes without prohibiting or sanctioning conduct that may be competitively neutral or even pro-competitive. The Commission should also ensure that the NCT does not undermine the principles outlined above that have led to the drawing of the boundaries of Articles 101/102.

To the extent there are clear-cut examples of conduct where experience and/or empirical evidence shows are inherently bad for competition, then it is conceivable that a case-by-case analysis would not be required (whether under Articles 101/102 or an NCT) and such types of conduct would lend themselves to being included in a list of per se prohibitions. Examples of conduct where such treatment may be appropriate, as they do not appear to have any pro-competitive rationale, may include product degradation (predatory innovation, such as in *Decca Navigator System*).

Questions 10-11: 'Anti-competitive monopolisation'

Key messages:

- The Commission identifies two alleged practices, 'unfair business practices' and 'limiting access to key inputs, such as data' - each warrants separate consideration.
- The imposition of unfair business practices by dominant firms is expressly prohibited by Article 102(a) TFEU, and, in respect of platforms (and irrespective of dominance) is addressed by the recent P2B Regulation. It would be helpful as the Commission develops its proposals for the NCT for the Commission to identify the alleged enforcement gap that case-by-case assessment would address.
- As regards access to key inputs, there may be areas where intervention could have benefits outside of the narrow scope of the 'refusal to supply' jurisprudence under Article 102. But we caution against seeking to catalogue these exhaustively in advance, rather than on a case-by-case basis. Google is in particular supportive of measures to enhance data portability and interoperability so as to facilitate consumer choice and drive competition.

The Commission's Q10 identifies a broad scope of conduct. Though we would agree that, in principle, market situations can arise where one market player is able to put competitors at an unfair disadvantage, we would urge a rigorous approach involving a careful, case-by-case assessment of specific instances, rather than blanket categorisation of a broad range of practices.

In its Q10 the Commission identifies two alleged practices that it appears to consider would be 'anti-competitive monopolisation'. These are each very different and need to be considered separately.

'Unfair business practices'

'Unfair business practices' is a potentially very broad category of behaviour. For the sake of providing legal certainty and protecting innovation, we would stress the importance of robust and consistent definitions of 'fairness' and evidence-based assessments of the competitive effects of specific practices. In particular, we would caution against defining 'unfairness' in a way that discourages innovation aimed at improving user experience, which can lead to a stronger market position. Our success in Search, for example, stems from investments in innovative new search engine features that users value. The CMA for example has surveyed both consumers and industry participants, acknowledging that "*Google's search results are generally perceived to be higher quality than those of Bing*". [10]

In investigating instances of potentially unfair business practices, the Commission should also be cognisant of whether the NCT will be the most appropriate tool. For example, both Article 102, as Article 102(a) identifies as an abuse "*directly or indirectly imposing … unfair trading conditions*",[11] and the existing P2B Regulation, which is targeted at addressing unfair business practices, provide alternative mechanisms for intervention.

'Limiting access to key inputs, such as data'

There is a strong case for data use and sharing goals to be effectively and proportionately pursued through existing means and collaborative efforts. Google has adopted an approach that is open but respectful of users' rights by making large-scale search datasets publicly available for free (e.g., through the Google Trends and Natural Questions tools, along with multiple other free and open source datasets). Though we are committed to open systems, we believe that discussions on 'limiting' versus sharing data access need to take account of the risks of any blanket data-sharing requirement to privacy and incentives to invest.

Article 102 provides an existing mechanism for companies to seek access to key inputs such as data they need to be able to compete under the refusal to supply doctrine. We note that to date, this doctrine has been interpreted narrowly, partly over concerns that sharing obligations reduce competition and diminish incentives of both the company subject to the obligation and the ones benefiting from it.[12]

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10 CMA market study: Online platforms and digital advertising, para 3.35.

11 And has been used by the Commission to sanction unfair trading conditions: see e.g. *Tetra Pak* and *BRT*.

12 As AG Jacobs said in *Bronner*: "*if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits.*

As we noted in our response to the IIA, we also consider that competition between digital platforms, including through innovation, can be enhanced by measures that let users switch and multi-home without losing access to their data (i.e. portability). In principle, interoperability and data portability may be the solution to the Commission's concerns relating to access to key inputs, subject to the limitations / concerns outlined herein, in our response to the DSA consultation and in our IIA response (e.g. the need to preserve innovation and product quality, and to protect user privacy).

As is apparent from the above, these are not clear cut issues and they require careful case-by-case analysis to determine whether or not there is a potential concern and, if so, how best to address such concern. The NCT could be a tool to facilitate and foster such assessment.

Questions 12-13: 'Oligopolistic markets / tacit coordination'

Key messages:

- In certain circumstances oligopolists may be able to behave in a parallel manner driving anti-competitive outcomes without an agreement or concerted practice falling within Article 101 and without satisfying the collective dominance test under Article 102. The NCT could have a role to play in investigating, and where appropriate intervening, in respect of such instances.
- These concerns are not unique to digital platforms, and can also arise on both sides of a platform as well as inter-platform.

In some cases, oligopolists may be able to behave in a parallel manner and derive benefits from their collective market power without necessarily entering into an anti-competitive agreement or concerted practice.

In Q12.3 the Commission lists a number of features that may in certain circumstances contribute to the creation of oligopolistic markets. The analysis of whether this leads to a substantial risk of tacit collusion will be fact-specific and requires a case-by-case analysis. Additionally, the analysis must go beyond these factors. It is important to note that certain markets may be most economically efficient with a small number of players, and this does not automatically mean that there is a competition problem.

The analysis of such markets must therefore progress beyond assessing whether an oligopoly has formed or whether there are factors which may make an oligopoly likely in the foreseeable future. This further analysis should focus on the likely outcome of that actual or putative oligopoly on competition. The relevant factors here are well known in competition analysis, e.g. is pricing competitive or is it maintained at supra-competitive levels, do companies continue to innovate and introduce new products and features, can competition be observed in practice e.g. through regular switching?

Whilst not unique to digital platforms, these concerns can arise on both sides of a platform as well as inter-platform. Coordination to game the outcome of platforms' offerings can adversely impact consumers. A recent AdC investigation in Portugal has found that two telecommunications services agreed to limit competition in advertising on the Google search engine. We note that a key question in considering whether to intervene in respect of such conduct will be whether it generates efficiencies that deliver benefits to consumers.

We acknowledge the need for the Commission to be able to intervene in oligopolistic markets prone to tacit collusion in order to preserve/improve competition. However, Articles 101 (through the concerted practices doctrine) and 102 (through collective dominance) can already be used to address certain concerns of this nature. The Commission should use these tools (including updating/issuing guidance) where possible as a first step, and consider carefully how to identify instances where investigating/intervening with the NCT would be an appropriate means of conducting the necessary case-by-case analysis. That analysis must both identify the presence or risk of an oligopoly, and determine the nature of the competitive effects produced by that market structure (which could be pro or anti-competitive, or competition neutral). Only once these two questions have been answered can the Commission determine whether intervention (under any tool) would be appropriate.

Questions 14-15: 'Pricing algorithms'

Key Messages:

- In many cases, the use of pricing algorithms leading to anti-competitive effects can be addressed under existing legislation, particularly Article 101 TFEU.
- There are however instances outside of the existing rules, e.g. anti-competitive effects driven by pricing algorithms but without an associated agreement or concerted practice. The NCT could be deployed where these arise (which could happen in any sector) using targeted, case-by-case assessment and intervention.

We note that the report for the Commission "Competition Policy for the digital era" referred to the "*intense academic discussion around the potential for pricing algorithms to enable alignment of prices.*"[13] The Furman review identified two main concerns, first *"That pricing algorithms might help make explicitly collusive agreements more stable, for example by making it easier for businesses to automatically monitor the prices their competitors are offering and detect when they deviate from the collusive agreement."* Second, *"That pricing algorithms could also lead to new forms of tacit collusion – where there is no explicit agreement between businesses to collude, but where pricing algorithms*

[13] J. Crémer, Y. de Montjoye, and H. Schweitzer, Competition Policy for the digital era: Final report, March 2019. Examples of academic works are Ezrachi and Stucke, Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy, November 2016; Calvano, Emilio and Calzolari, Giacomo and Denicolo, Vincenzo and Pastorello, Sergio, Algorithmic Pricing: What Implications for Competition Policy? (July 7, 2018).

effectively deliver the same result. At the extreme, pricing algorithms drawing on machine learning technology could autonomously learn to collude."[14]

As the Commission has noted, to a large extent, pricing algorithms can be analysed by reference to the traditional reasoning and categories used in EU competition law.[15] Competition authorities have already dealt with cases on the first concern.[16] In a recent joint report the French and German competition authorities concluded that *"the existing tools seem, at this stage, flexible in their application to cases involving algorithmic behaviour."*[17]

However, Article 101 would not apply if pricing algorithms produce price coordination absent an agreement / concerted practice to that effect. To the extent that the Commission could use a new tool to investigate such concerns, as we noted above in the context of oligopolistic markets / tacit coordination, it would need to undertake a case-by-case analysis to determine whether this creates a problem by in fact reducing price competition and thereby causing consumer harm. This is exemplified by the Webtaxi case, where competition concerns arising from use of a pricing algorithm between competitors were offset by enhanced efficiency.[18]

We note also that the distinction between whether the goods/services are digital or not does not seem relevant to the use of pricing algorithms.

Questions 16-17: 'Tipping / winner takes most markets'

Key messages:

- Certain markets, in a variety of sectors, may be susceptible to consolidation in the hands of one larger player in certain circumstances. Case-by-case assessment is required to identify the markets at risk and the factors which may lead to 'tipping'.
- 'Tipping' could, in principle, occur absent a practice which is prohibited under Articles 101/102, and an NCT may be an appropriate means of investigating this issue.
- Even where it can be established that a market has tipped or is at significant risk of tipping, a variety of additional factors should be taken into account, such as the scope for potential entry to serve as a competitive constraint, and the impact

[14] Unlocking digital competition, Report of the Digital Competition Expert Panel (March 2019), ¶3.158.

[15] Algorithms and Collusion - Note from the European Union, for OECD roundtable, 14 June 2017.

[16] E.g. CMA, Online posters and frames, September 2016; CJEU, Case C-74/14 *Eturas*, ECLI:EU:C:2016:42; and Luxembourg Competition Authority, Webtaxi, 7 June 2018.

[17] Algorithms and Competition, Joint study of the French Autorité de la concurrence and the German Bundeskartellamt, November 2019.

[18] Luxembourg Competition Authority, Webtaxi, 7 June 2018.

of intervention on incentives to invest, before taking any enforcement action.

Certain markets, in a variety of economic sectors and under certain circumstances, may be susceptible to consolidation in the hands of one large player. However, as the authors of the UK report "Unlocking Digital Competition" identified, *"Digital markets vary greatly so no general rules apply to all of them. But in many cases tipping can occur once a certain scale is reached, driven by a combination of economies of scale and scope; network externalities whether on the side of the consumer or seller; integration of products, services and hardware; behavioural limitations on the part of consumers for whom defaults and prominence are very important; difficulty in raising capital; and the importance of brands."*[19]

A case-by-case analysis will thus be required to identify markets which are prone to tipping, which market features may lead to tipping,[20] and to determine whether, if so, they would in fact tip and whether subsequent events such as technological developments or market entry would reverse the impact. A strong market position does not preclude the potential for new competitors to arise, as the threat of such competition "*keeps incumbents on their toes*" and leads them to "*innovate to avoid being replaced*".[21]

As identified in various reports such as those referenced above, tipping may occur due to the factors listed by the Commission (network effects, economies of scale and single-homing), and these factors may be present in some digital markets, the digital sector is highly competitive with a vast number of companies and therefore tipping cannot be said to be an inherent characteristic of digital sectors/markets.

In the digital economy, new technologies develop and marketplaces change quickly. For example, small companies can rapidly achieve a prominent position displacing incumbents (e.g., despite only being released globally in 2018, TikTok is now one of the most downloaded apps of the last decade[22] and ranked in sixth place in the global mobile app rankings by monthly active users for 2019).[23]

The competition concerns relating to tipping may not be addressed fully by Article 101 (there is no agreement / concerted practice) and Article 102 (the firm(s) may not yet be

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19 Unlocking digital competition, Report of the Digital Competition Expert Panel (March 2019), page 4.

20 See, e..g, BKartA, B6-113/15, Working Paper – The Market Power of Platforms and Networks, June 2016 (executive summary, and full paper). The Bundeskartellamt's analysis is in the context of assessing the market dominance of digital platforms and networks, rather than tipping specifically. It examines in particular the relevance of direct and indirect network effects, economies of scale, the prevailing types of use on the opposite market side (single-homing/ multi-homing) and the degree of differentiation, access to data, and the innovation potential of digital markets.

21 Competition and the Industrial Challenge for the Digital Age, Jean Tirole, April 3, 2020. See also Federico, Giulio and Scott Morton, Fiona M. and Shapiro, Carl, Antitrust and Innovation: Welcoming and Protecting Disruption (May 24, 2019). Available at SSRN: https://ssrn.com/abstract=3393911 or http://dx.doi.org/10.2139/ssrn.3393911.

22 *See* App Annie, A Look Back at the Top Apps and Games of the Decade, 16 December 2019.

23 *See* HootSuite, There Are More Social Media Users Today Than There Were People in 1971, January 2020; and AdWeek, App Annie: TikTok Was the Most-Downloaded App in Q1 2020, 2 April 2020.

dominant, and the concerns may not necessarily be an abuse). Thus there may be a case for the Commission to intervene in some markets that it identifies are at risk of tipping in cases where it may not be able to do so currently.

Questions 18-19: 'Gatekeepers'

Key messages:

- We caution against seeking to exhaustively identify specific gatekeepers or the sectors / markets in which they may be present in advance. An evidence based case-by-case approach should be adopted.
- The factors which the Commission identifies in its questions as making markets susceptible to gatekeepers or as the potential effects of the presence of a gatekeeper may be relevant to varying degrees depending on the particular industry and this may change over time. It is not always clear whether such effects lead to outcomes which enhance or hinder competition. Evidence based case-by-case assessment is required, not only to determine whether a gatekeeper is present, but also to determine whether intervention is required and if so what form it should take.
- A package of complementary reforms (including enforcement of existing rules as well as new legislative measures) may be an effective way of modernising the EU competition regime including to address the Commission's concerns regarding 'gatekeepers'. A properly designed and implemented NCT could play an important role in facilitating the evidence based assessment required to determine the shape of that package.

The Commission appears to consider gatekeepers as large online platforms driven by strong economies of scale and direct and indirect network effects who increasingly act as private gatekeepers to critical online activities for an exceptionally large population of private and business users. As explained further in our response to the consultation on the proposed Gatekeeper Regulation, identifying which firms qualify as gatekeepers is a complex exercise that requires further analysis.

The advantage of the NCT, as the Commission appears to envisage it, is that it would be flexible enough to investigate competition concerns in a market without needing to label a subset of platforms as 'gatekeepers'. As we noted in our response to the IIA, if the threshold in, for example an ex ante regulation, is that a platform is a 'gatekeeper', then the Commission would need to consider carefully how to define 'gatekeeper' platforms in a clear and certain way that is sufficiently future-proof.

Further, we note that the mere presence of a 'gatekeeper' does not necessarily give rise to competition concerns and may generate pro-competitive effects, which would need to be taken into account in any analysis of the effect on competition. For example, whilst some may label Google, Apple, Facebook, and/or Amazon as gatekeeper platforms, as we noted

in our response to the IIA these four companies are reported to be some of the largest investors in R&D, as reflected in the 2018 Global Innovation 1000 study. Google has consistently spent over 15% of its revenues on R&D since 2016. By contrast, the average 'R&D ratio' in the EU is 3.4%.

The Commission's concern in the digital sector appears to relate to "*some large online platforms benefitting from significant network effects and acting as gatekeepers*". Nevertheless, the relevance of network effects, other factors, and countervailing factors (multi-homing etc.), varies between markets, and therefore it would be difficult to characterise gatekeeper scenarios as "common" in digital sectors/markets. The Commission should also be cautious in condemning network effects, which can create virtuous cycles and encourage pro-competitive behaviour by the platform on both sides of the market in certain circumstances.[24] A case-by-case assessment is needed to identify a gatekeeper, its ability and incentives negatively to affect competition, and pro-competitive benefits. App platforms, for example, though characterised by some as 'gatekeepers', have been widely recognised as driving innovation and growth in the app economy. According to one study, European consumers spent $5.2 billion on Google Play in 2019, an 18.0% year-on-year increase.

The Commission's approach to gatekeepers appears to date to be focused on "online platforms" and thus to that extent the gatekeeper scenarios posited by the Commission occur in digital markets. However we note that one side of a digital platform may be retail, with digital being only one channel in a wider market(s). Also, there may be gatekeepers in markets such as electronic communications, and more traditional essential facilities (e.g. ports). Thus depending on the definition adopted, gatekeepers may not be limited to the digital sector.

Each of the factors posited by the Commission in Qs 18.7 and 18.9 may be relevant to varying degrees in a particular industry, and this may change over time. In a recent Deloitte report, one EU developer described app platforms as offering "great opportunities, a fantastic medium" for developers. As such a case-by-case analysis is required to identify which companies may qualify as a gatekeeper in a particular market, and whether their role as a gatekeeper gives rise to any potential competition problems.

To the extent that the Commission identifies competition concerns relating to gatekeepers, then we acknowledge that there may be an enforcement gap with respect to existing competition law tools. Notably, in the context of Article 101 there may not be a relevant agreement / concerted practice; and in the context of Article 102 either the gatekeeper may not be dominant, or the behaviour at issue may not be an abuse. Thus there may be a case for the Commission to intervene where it identifies competition concerns arising from a firm being a 'gatekeeper'.

In this regard, the contemplated NCT could provide a useful way of better understanding the relevant markets, including through any framework for more advanced evidence-gathering and analysis, and addressing any market failures using flexible and

[24] See, e.g.: http://faculty.haas.berkeley.edu/HERMALIN/armstrong.pdf,

creative remedies. The flexibility of the contemplated NCT may be particularly useful in the context of gatekeepers given that a case-by-case analysis is required to identify any competition concern, and balance these concerns against any pro-competitive benefits from the platform under consideration.

As we identified in our response to the IIA and expanded upon in our response to the Digital Services Act consultation in respect of the proposed gatekeeper regulation, the solution to the 'gatekeeper' concerns may comprise a package of complementary reforms. New regulations could address issues that fall outside the scope of competition law, but which are important for digital markets to function in a fair, efficient manner (e.g., ensuring data portability, appropriate levels of transparency, and fairness in contractual relations). It appears to us at this initial stage that some of these measures could be important whatever the size or market position of the digital platform at issue. Similarly, as one looks back at the unpredictable nature of historic innovation and tries to imagine what kinds of digital products and services European consumers will be using in the future, it seems reasonable to assume that notions of 'gatekeeper', 'platform', and even 'digital' will need to be robust and flexible. The NCT could have a valuable role in any such package of reforms, enabling evidence based case-by-case assessment where the object of the Commission's concerns falls outside the scope of existing (or future) *ex ante* regulation.

Questions 20-23: sectoral scope of the NCT

Questions 20-23 seek views on the sectors / markets which should be within scope of the NCT (e.g. digital only or all) and specifically ask whether there are specific markets / market situations in which structural competition problems have arisen which Articles 101/102 cannot sufficiently or effectively address.

Key messages:

- Whilst they may be present in certain digital markets, the structural competition problems posited by the Commission are not necessarily limited to digital markets. In keeping with the principle of the universality of EU competition law, Google submits the NCT should apply to all sectors of the economy.

- There may be areas where anti-competitive effects result from practices or market scenarios which cannot be effectively addressed by the existing EU competition legislation. However, assessing whether the existing tools are applicable and which tool to deploy will require a case-by-case assessment. The legislation should be flexible enough to allow this.

Many of the factors relating to structural competition problems identified by the Commission in its IIA related to digital markets. However, it is not necessarily the case that

structural risks for competition and structural lack of competition are limited to digital markets.

Under the UK's market investigation tool, which we understand to be an inspiration for the NCT, *"As well as being able to look into the conduct of firms, the [CMA] can probe for other causes of possible [Adverse Effects on Competition], such as structural aspects of the market (including barriers to entry and expansion) or the conduct of customers."*[25] In its guidance on the tool, the CMA identifies a variety of structural features it has identified, in a variety of markets. [26] The CMA has, by way of illustration, intervened in respect of the supply of energy, retail banking services, airports and aggregates, amongst others.

It is also a general principle of EU competition law that it applies universally, without regard to the nationality of the company, its owners, or sector. As such, should the Commission propose a narrow NCT, for example limited to digital markets, it should enunciate clearly the basis on the reasons for excluding certain sectors, and consider carefully whether this undermines the universal application of competition law.

We note in this regard comments by Executive Vice President Vestager in a recent speech: *"Many of the biggest issues that this tool could help us resolve are linked to digital markets. But I doubt that it would make sense to apply it only to these markets – instead of covering the whole economy, as our existing competition powers do. That's partly because the sort of issues I've discussed come up in many other markets as well. In fact, the Greek, Icelandic and British competition authorities have so far only used this type of power in markets that aren't digital. It's also because the digital transition is affecting pretty much every industry there is. So it's hard to draw the line between what's digital and what isn't – especially when you consider that the rules we come up with now should be ready for the future, when that line may get even more blurred."*[27] EVP Vestager has also commented that *"Neutrality is a guiding principle of everything we do. When we take our decisions, we have to follow where the evidence and law lead us, and treat every business the same. However big or small they are, and wherever they come from"*.[28]

We agree that on the basis of the concerns identified by the Commission there may be opportunities to modernise the EU competition law framework. However in some instances where existing competition law may be the appropriate tool. The Commission's assessment of which tool to use to address a particular problem in a particular sector would require an evidence based, case-by-case assessment, and therefore the legislator should be cautious of legislating in advance to limit a particular tool to markets/ sectors with particular characteristics.

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25 Guidelines for market investigations: Their role, procedures, assessment and remedies, April 2013, CC3 (Revised), para. 19.

26 Ibid, paras. 157-158.

27 "Competition in a Digital Age: Changing Enforcement for Changing Times", ASCOLA Annual Conference, 26 June 2020.

28 "Protecting consumers from exploitation", Chillin' Competition Conference, Brussels, 21 November 2016.

D. Assessment of Policy Options

Question 24

Question 24 asks whether the NCT is needed.

Key messages:

- The contemplated NCT could provide a useful way of better understanding markets, including through any framework for more advanced evidence-gathering and analysis, and addressing any market failures using flexible and creative remedies.
- Case-by-case assessment of the evidence will remain core to identifying where there is a departure from competition on the merits justifying intervention.
- A range of measures could be adopted to enable more effective enforcement, including enhancements to the existing antitrust rules and the use of a new tool along the lines of the proposed NCT.

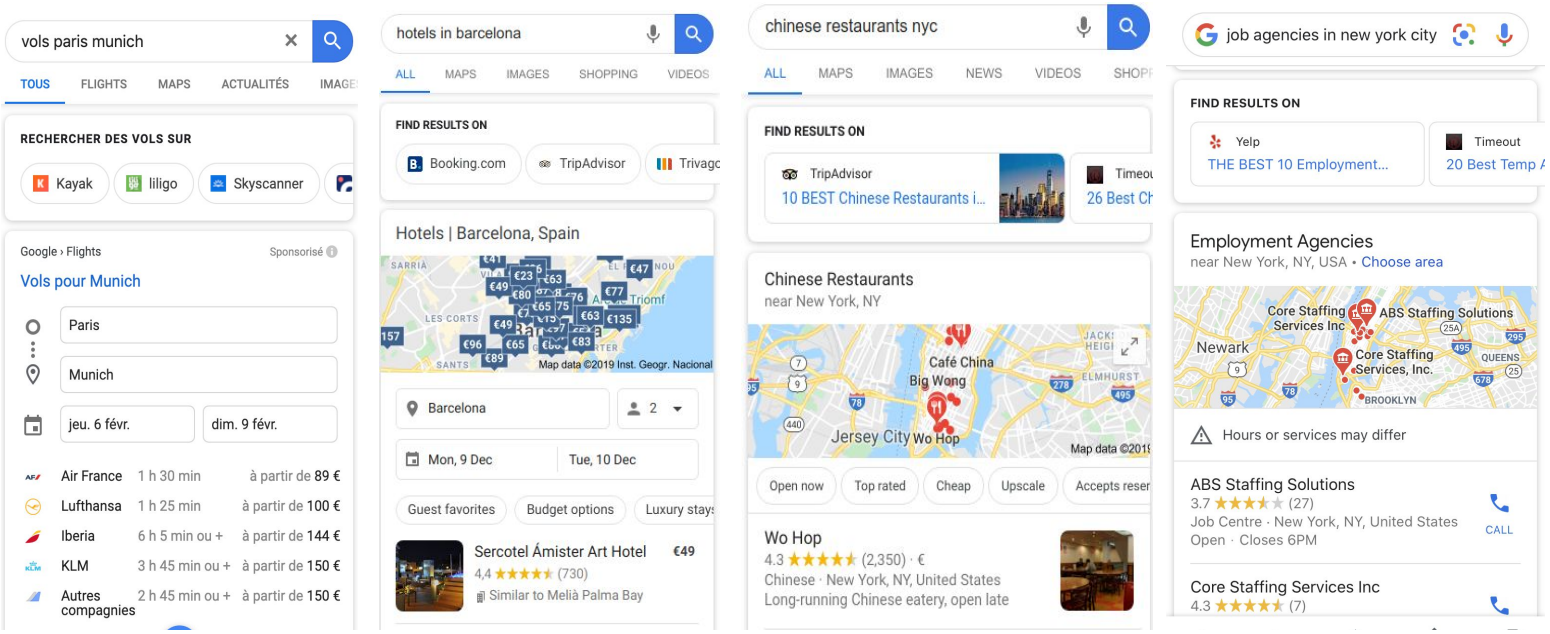
Several of the proposals that are now under consideration by the Commission have the potential to promote competition and innovation in the EEA. For example, we have long supported enhanced data portability, which facilitates switching, multi-homing, and provides opportunities for new players to enter or expand in digital markets. Providing better access to aggregated datasets could benefit research and development in a range of industries while also safeguarding user data privacy.

The contemplated NCT could provide a useful way of better understanding markets, including through any framework for more advanced evidence-gathering and analysis, and addressing any market failures using flexible and creative remedies. It could also allow for efficient consolidation of complaints, expedite evidence-based inquiry by including all relevant market participants in an investigation.

Evidence will continue to be core to the question of whether or not firms are competing on the merits. For example, integration between different products or services can promote or restrict competition. Our experience has been that telling the difference often requires a detailed, case-by-case and fact-based assessment of the effects on consumer welfare. It may, therefore, make more sense to adapt existing antitrust tools and procedures to allow assessments to be carried out more swiftly and effectively. This could be achieved, for example, through organisational and procedural changes that enable more efficient (and shorter) proceedings, and by setting up specialised teams with the expertise to assess complex technical matters. Where needed, antitrust investigations could be fortified by: (i) targeted use of interim measures; (ii) well-designed remedies; (iii)

intervention against specific, harmful forms of conduct (complemented by updated guidance); and (iv) use of a new tool along the lines of the proposed NCT.

Finally, we note that engaged dialogue between firms and regulators can lead to change, outside formal investigations. For example, following discussions with the Commission, Google launched choice carousels to enhance the visibility of rival search services and provide additional choice for consumers. Google displays choice carousels that list third party search services above specialised results for flights, hotels, local businesses, and jobs. In these carousels, Google shows links to search services, together with logos or images, in a scrollable horizontal row. These carousels give users additional choices without depriving them of the benefits of the specialised results:



Feedback from services that appear in the carousel has been positive. Several services have publicly highlighted the launches on Twitter accounts, including: La Fourchette in France, which explained it was pleased to be one of the first to test the carousel; Bookatable in Germany: Restaurantes.com in Spain; and Paginas Amarillas in Spain. Jobs sites have also been commenting on the launch in Germany, including Monster, Gigajob.com, and Experteer.de.

Question 25

Question 25 asks whether the NCT could be used to prevent structural competition problems from arising and thus allow for early intervention in the markets concerned (i.e. on an ex ante basis).

Key messages:

- The Commission contemplates using the NCT on *ex ante* basis, i.e. to identify and address competition concerns where there is a structural *risk* to competition.
- The NCT could be precisely the tool to deploy on an *ex ante* basis because it will permit evidence driven case-by-case decision making, leading to *ex ante* interventions to prevent harm from arising only where justified.
- *Ex ante* intervention to address structural risks to competition should be accompanied by a suitable remedies framework, as discussed below.

We understand that the Commission contemplates using the NCT both *ex post*, i.e. to identify and address competition concerns in a market with a structural *lack* of competition, and also on an *ex ante* basis, i.e. to identify and address such concerns where there is a structural *risk* to competition.

When investigating *ex ante* risks, there is inherent uncertainty as to whether harm will arise, in particular in fast-moving digital markets characterised by high levels of investment and innovation. Accordingly, such intervention should involve a case-by-case assessment before any *ex ante* remedy (or indeed *ex ante* regulation) is put in place. Otherwise there is a risk of chilling innovation to the detriment of consumers. Under existing case law, the Commission has to meet a high standard when intervening against prospective harms;[29] this can only be met through a case-by-case assessment.

We thus consider that the contemplated NCT is a useful way of better understanding markets, including through a framework for more advanced evidence-gathering and analysis. This makes the NCT the correct tool to conduct an assessment of markets where there is a structural *risk* to competition, as it can consider the evidence on a case-by-case basis before making *ex ante* interventions to avoid structural risks to competition materialising into a structural lack of competition.

We discuss the remedies framework further below but we note here that *ex ante* intervention to address structural risks to competition should be accompanied by a suitable remedies framework which allows measures which steer market developments away from competition issues towards a more competitive outcome. For example, following its retail banking market investigation the CMA implemented 'Open Banking', a means of sharing consumer and SME banking data amongst providers using an API so as to encourage entry and switching. Such interventions can also allow markets to develop into more competitive structures (or avoid developing into anti-competitive structures) without further intervention including intrusive changes to existing market structures.

Staged interventions can also be an effective means of tackling such issues - see our discussion of the approach of the CMA in its "Online platforms and digital advertising market study" in response to questions 30-32 below.

[29] E.g. *Tetra Laval* and *CK Telecoms*.

Questions 26-28: Scope of the NCT

Questions 26-28 invite views on the scope of the NCT, specifically: the main structural competition problems it should address; whether it should be 'horizontal' and apply to all sectors or only to certain sectors; and whether it should require dominance as a threshold for intervention.

Key messages:

- Structural competition problems are likely to vary between markets and evolve over time. The design of the NCT should be flexible enough to account for this.
- As such, setting dominance as a threshold for intervention raises the risk of the NCT not being able to address structural (rather than firm-specific) competition problems. Similarly, limiting the NCT to certain sectors or markets risks creating a tool which lacks the flexibility to account for future market developments.
- By contrast, a generally applicable NCT could provide the Commission with sufficient flexibility to address structural and other competition-related issues.

It is likely that structural concerns in markets will vary market-to-market, and may change over time. Thus what may be important for competition in one market may not be important for competition in another market. As such, flexibility and future proofing will be important considerations in the design of a NCT.

In terms of whether the NCT should be limited to dominant companies only, we note Executive Vice President Vestager's comments that *"The rules we have today can't stop big companies from pushing markets towards the tipping point, unless those companies are already dominant in a market. And that isn't just an issue in digital markets. In the last two decades, four-fifths of Europe's industries have become more concentrated, with the biggest companies taking an ever larger share of the market."*[30]

We agree with this sentiment, and note that setting dominance as a threshold for intervention raises the risk of the NCT not being able to address structural (rather than firm-specific) competition problems.

In terms of whether the NCT should apply to all or a limited category of markets, we consider it a valid question as to whether legislation could identify sufficiently precisely the sectors to be covered by the NCT in a way that can take account of future market developments, particularly in fast-paced and technology-driven industries. By contrast, a generally applicable NCT could provide the Commission with sufficient flexibility to address structural and other competition-related issues.

[30] Keeping the EU competitive in a green and digital world. College of Europe. Bruges, 2 March 2020.

Question 29

Question 29 asks how the NCT could smoothly interact with sector specific regulation.

Key messages:

- Minimising duplication between different tools is essential in order to enhance legal certainty. This includes not only existing sector specific regulation, but also equivalent tools at the Member State level, the current sector inquiry regime, other EU legislation (e.g., Articles 101/102), and ex-ante regulation.
- Done well, the creative application of different legislative instruments can be an effective means of delivering positive change.

In terms of how the NCT would interact with a range of existing rules and regulations, we note that minimising duplication between different legislation is important so as to enhance legal certainty. As we identified in our IIA response, some considerations governing whether or not a new tool ought to be deployed may include:

(1) EU vs national regimes: how the NCT will interact with equivalent tools at the Member State level, the role of subsidiarity, the risk of conflicting outcomes, and whether a 'one-stop-shop' principle may be appropriate;

(2) Interaction with the current sector inquiry regime: the Commission appears to envisage the current EU sector inquiry regime continuing to exist in parallel. The Commission should consider the basis on which it would choose between a sector inquiry or deploying the NCT, and whether there is scope for formalising the interaction between the two tools;

(3) Interaction with other EU legislation (e.g., Article 101/102): the Commission posits that the NCT will be used to address structural competition problems that cannot adequately be addressed by the existing legislation. The consultation could therefore consider how and at what stage in an investigation it will identify whether it is appropriate to proceed with the NCT or other EU legislation (for example, one option would be to draw inspiration from the UK market investigation regime, where the CMA's guidance provides that it will not make a market investigation reference where an investigation under the Competition Act (containing the UK domestic equivalents of Articles 101 and 102) is more appropriate); and

(4) Interaction with ex ante regulation: the consultation could also consider how the NCT and any ex ante regulation (including the new regulation discussed in this paper) will interact and how it will design the overall regime so as to ensure legal certainty. In particular, to provide certainty and predictability for businesses, it will be important to

minimise overlaps so that companies do not have to confront multiple regulatory regimes with the same aim.

Done well, targeted enforcement combined with sector specific regulation can be an effective means of delivering change. For example, following its retail banking market investigation, the CMA imposed a requirement for certain UK retail banks to engage in 'Open Banking' (described above). The CMA proposed this remedy following the passage of the Second Payment Services Directive (PSD2) but before the deadline for its domestic implementation. PSD2 contains certain requirements which overlap with the Open Banking remedy, requiring banks to give access to customer financial data to third party payment providers (with customer consent). To ensure the coherent adoption of these two regimes, the CMA proposed that the Open Banking 'Implementation Entity' also have a role in administering PSD2. The CMA also viewed the Open Banking remedy as complementing PSD2 in other ways, e.g. the API required by Open Banking could also be used to comply with PSD2.

Questions 30-32 and 35-36: Remedies

Questions 30-32 ask about the range of remedies that should be available under the NCT: non-binding recommendations; recommendations to sectoral regulators; legislative recommendations' imposition of behavioural / structural remedes, including specifically whether there are circumstances in which only structural remedies can effectively address structural competition problems.

Question 35 asks whether interim measures should be available to address irreparable harm.

Question 36 asks whether the Commission should be able to accept voluntary commitments.

Key messages:

- Google would support the NCT being accompanied by a broad range of remedial tools, to ensure that the remedy framework can effectively address structural competition problems whilst preserving existing market dynamics to the extent possible.
- The applicable legal test and evidentiary standard should be calibrated in light of the remedial tools which will be available, ensuring that measures requiring significant intervention can only be imposed following a thorough, clearly evidenced and well reasoned analysis.
- The imposition of structural remedies should be seen as a weapon of last resort and should follow a particularly rigorous analysis. Wherever possible, the Commission should seek opportunities to allow less interventionist measures to

drive the necessary change.

- Remedies should be able to evolve over time to reflect market developments.
- Google is supportive of enabling the Commission to accept voluntary remedies, as is the case in its Article 101/102 investigation.

The NCT potentially applies to a broad range of market sectors and a broad range of potential concerns. Further, as set out in response to Qs 27 and 28 above, Google would support the NCT being adopted in the broadest form proposed by the Commission, applying to all sectors of the economy and all markets in which structural competition problems may be present, without requiring dominance as a threshold for intervention.

Against that background, we support inclusion in the legislation of each of the four options posited by the Commission in Q30, and, within the Commission's ability to impose remedies, the three options posited in Q31. An appropriate range of remedial tools is important to ensuring that the remedy framework can effectively address structural competition problems whilst also preserving existing market dynamics that do not contribute to those problems, as we set out in our response to the IIA. I.e. in designing the remedies framework the Commission should be guided by the principles of effectiveness, proportionality and flexibility.

As we explained in our response to the IIA, an important issue the Commission should consider when designing the provisions which will permit it to impose remedies is the legal test and evidentiary standard that will apply. When imposing remedies, precedents exist in a number of regimes, for example the 'Adverse Effect on Competition' test applicable in the UK market investigation regime, or the 'Significant Impediment to Effective Competition' test in the EU Merger Regulation. Both of these examples carry extensive jurisprudence on both the legal test and the associated evidentiary standard. Google would also support the adoption of flexible standards, with higher standards applicable for stricter or more interventionist remedies.

Whilst we support the NCT being supported by a broad range of remedial tools, we consider that it is important that those tools are utilised within the correct confines. Part of this is satisfying the appropriate legal test as we note above. In addition, the Commission should not use the NCT to introduce remedies (or a series of remedies) that better fall within the purview of new legislation following the appropriate legislative procedure. Seeking to address through antitrust enforcement matters which are better dealt with through legislation can produce potentially prolonged periods of legal uncertainty and poor outcomes.[31]

[31] As is for example illustrated by the series of Commission Decisions concerning interchange fees before the adoption of the Interchange Fee Regulation.

The imposition of structural remedies should be a last resort following rigorous analysis

Structural remedies are potentially highly draconian and risk significant adverse effects on incentives to invest and attendant chilling effects on innovation. They also risk unintended consequences and potentially adverse future market developments (i.e. they risk "*throwing the baby out with the bathwater*"[32]). This is particularly so in rapidly developing sectors, as for example 'digitised' sectors typically are. If the target of a structural remedy is not sufficiently stable, implementing it may carry costs that outweigh any benefits of intervention.

Accordingly, the imposition of structural remedies should be subject to a suitably high legal threshold and evidentiary burden. The Commission should proceed cautiously, only imposing structural remedies where it is satisfied that intervention is justified and no other solution is available (including where appropriate pursuing other, less intrusive, remedial measures first as outlined above).

By way of illustration, in its market study into online platforms and digital advertising, the CMA discussed whether it would be appropriate to adopt certain structural remedies in respect of Google's activities in open display advertising (specifically 'separation' remedies: namely divestiture, operational separation or specific restrictions targeted at conflicts of interest). The CMA ultimately concluded that it would not be appropriate to seek to impose any 'separation' remedies, but that it would recommend that these powers be made available to the new Digital Markets Unit (DMU).[33] Two main factors drove this conclusion.

- **First**, the CMA emphasised the need for further analysis and investigation, stating that when considering the use of its separation powers it would be incumbent upon the DMU to "*assess whether operational separate is sufficient, and if not, consider ownership separation, balancing the costs of intervention with the benefits for consumers through innovation and more effective competition*". I.e. there are at least two questions that should be asked before structural measures are imposed: (1) is any less intrusive measure effective; and (2) if not, is a structural measure proportionate.

- **Second**, the CMA noted that the relevant products and technology are "*likely to change over time, and therefore the effectiveness of an 'one-off' intervention to separate current activities is likely to be time-limited*". I.e., particularly in dynamic and fast moving markets, caution should be exercised before imposing structural remedies given the increased difficulty in later reversing or adapting remedies to take account of market developments.

Google considers that the Commission should view this more recent analysis by the CMA as instructive as to the role of structural remedies within the NCT, rather than the few

[32] Competition and the Industrial Challenge for the Digital Age, Jean Tirole, April 3, 2020.

[33] A new body empowered to implement certain regulatory functions proposed by the CMA.

historic market investigation cases where the CMA has imposed structural remedies. The Commission should focus on first principles in establishing a remedies framework, rather than potentially poorly analogous precedent.

- **First**, CMA market investigation decisions are taken by members of a panel of independently appointed decision makers. Panel members are not formally affiliated with the CMA and are not, for example, involved in forming the CMA's policy objectives. This structure provides an insulation from factors external to specific cases (e.g. political factors) thereby acting as a safeguard for relevant undertakings. Replicating this structure is not possible within the institutional framework of the Commission and therefore it cannot be assumed that it is appropriate for the Commission to fully replicate the powers available to the CMA unless it can also implement additional procedural safeguards to compensate for this institutional safeguard which cannot be recreated.

- **Second**, not only is the imposition of structural remedies following a CMA market investigation rare, but the cases are highly fact specific. For instance, the CMA imposed a package of divestment remedies following its market investigation into UK airports, requiring BAA plc to sell a number of London and Scotland based airports. However, it is important to note that BAA plc was a product of privatisation and was formerly the state owned British Airports Authority. It was not a company which had grown from the ground up as a commercial entity through investment and innovation. The CMA did not, therefore, have to grapple with the complex issues regarding the risk of chilling effects on innovation and investment that it would face outside of that narrow case specific context. If the Commission does incorporate the power for structural remedies within the NCT, it will be vital to assess in depth the case-specific implications of any single decision, while adhering to fundamental principles of only employing such remedies in a sparing and proportionate way, on the basis of robust evidence.

It is not possible to identify in advance structural competition problems that can only be resolved by structural remedies (Q32)

The result of the broad scope of the NCT, is that it would be applicable to a potentially very broad range of structural competition problems. One virtue of a properly designed and implemented NCT is that it will allow evidence driven case-by-case assessments of potential structural competition problems and the measures, if any, required to remedy such problems which may include, as a measure of last resort, structural remedies. We accordingly caution against seeking to identify at the outset potential candidates for the imposition of structural remedies.

The Commission should consider and adopt a remedies framework which permits remedies to evolve overtime

The Commission should consider how to deploy the remedial tools at its disposal to adjust the degree of intervention it adopts overtime so as to ensure that the appropriate balance

between addressing competitive harm and preserving non-problematic existing market characteristics is consistently struck overtime.

Part of this will involve the Commission considering how to readily permit revision or revocation of remedies. As we noted in response to the IIA, this will be of particular importance in dynamic markets where market developments may render remedial measures no longer appropriate. In addition, there will likely be scenarios where it is appropriate for the Commission to introduce remedies on a phased basis, beginning with the least intrusive measures and giving such measures adequate opportunities to deliver competitive change before introducing further measures.

For instance, in respect of its market study into online platforms and digital advertising (8.21-8.48), the UK CMA proposed a package of remedies intended to decrease perceived barriers to entry and expansion in the supply of general search services. The CMA's proposed package of remedies includes measures which vary in the impact they will have on competition and the immediacy of that impact on the one hand, and in their degree of intrusiveness and the attendant costs to relevant undertakings on the other.

Recognising the need to strike the balance between these concerns, the CMA proposed that the initial package of interventions in respect of general search should focus on a number of less interventionist measures adopting an "*iterative approach to testing and trailing*" remedies before considering more interventionist measures. The CMA noted that successful implementation of less intrusive interventions may obviate the need for more intrusive measures; or, conversely, may confirm that such measures are required.

In striking this balance, the CMA expressly avoided creating a chilling effect on innovation. The CMA observed that "*the impact of this intervention of dynamic incentives needs to be given careful consideration*". The CMA then discounted certain particularly intrusive measures which ran "*excessive risks to innovation*". One remedy it considered was requiring Google to share 'click and query' data with search competitors. That remedy could discourage innovation by encouraging third-parties to replicate the results that we show, which would lead to lower quality services for users by reducing incentives for search engines to innovate and improve algorithms. The CMA acknowledged further work was required to "*consider how this intervention could be designed in a manner that enhances incentives to innovate*".

A staged approach to remedy implementation is just one way the Commission can ensure that the appropriate balance is struck between addressing potential concerns and preserving existing market dynamics which do not contribute to these concerns. We acknowledge it may not be appropriate in all circumstances, particularly where prompt action may be needed. However, it does illustrate the value in a broad range of remedial options, and the valuable flexibility in approach that would be lost if the legislation is cast narrowly.

Question 35: Interim Measures

As we set out in our response to the IIA, rather than adopting an ex ante regulatory framework, it may be more appropriate to adapt existing antitrust tools and procedures to allow assessments to be carried out more swiftly and effectively. We suggested that one element of this may be fortifying antitrust investigations by the targeted use of interim measures only for obvious and egregious abuses that cause serious and irreparable harm.[34]

To include the possibility to impose interim measures in the NCT, we encourage the Commission to clearly identify a gap between interim measures in antitrust investigations on the one hand and ex ante enforcement via the NCT on the other. Otherwise, the overlapping regimes may lead to legal uncertainty.

In designing an interim measures regime, we encourage the Commission to have regard to the same overall factors as we suggest for the remedies regime, *i.e.* flexibility, effectiveness and proportionality. Particularly, for interim measures it will be important to ensure that measures are withdrawn when no longer necessary, or where the burden of having them in place outweighs their benefits.

Question 36:Voluntary commitments

Google supports enabling the Commission to accept voluntary remedies, as is the case in its Article 101/102 investigations,[35] including at different stages of the process (analogous to offering commitments to avoid a reference to Phase 2 in merger control, or the 'undertakings in lieu' in the UK market investigation regime). This would ensure flexibility and proportionality in the regime.[36]

E. Institutional Set-Up of a New Competition Tool

Questions 33-34

Questions 33-34 address administrative matters, relating to the powers the Commission should have to investigate and whether binding statutory deadlines should be in place.

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[34] We also suggested other fortifying measures, where needed: well-designed remedies; intervention against specific, harmful forms of self-preferencing (complemented by updated guidance); and use of a new tool along the lines of the proposed NCT. A further example we provided was for organisational and procedural changes that enable more efficient (and shorter) proceedings, and the setting up specialised teams with the expertise to assess complex technical matters.

[35] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in [Articles 101 and 102 TFEU] [2003] OJ L1/1, Article 9.

[36] See also Jean Tirole "We must develop what I would call "participative antitrust," in which the industry or other parties propose possible regulations and the antitrust authorities issue some opinion, creating some legal certainty without casting the rules in stone". (quoted in an article in Quartz "A Nobel-winning economist's guide to taming tech monopolies" June 27, 2018.

Key messages:

- Robust information gathering powers are essential for the NCT to serve its purpose as a useful means of better understanding markets and flexibly addressing market failures, and so that the Commission can obtain evidence necessary to meet the requisite legal standard.
- The Commission should match the information gathering powers it has to those applicable under the existing EU antitrust and merger control regimes.
- Binding deadlines can have value in providing certainty to undertakings and fulfilling the Commission's desire to act quickly, provided that they do not curtail proper investigation.

We note that Executive Vice President Vestager has commented that the NCT *"would let us investigate markets, in the same rigorous way that we already look into individual cases – with the same exacting standards of proof, the right for the companies involved to defend themselves, and the need for the decisions that we take to stand up in court."*[37]

Question 33: Investigatory powers

Given that the contemplated NCT could provide a useful way of better understanding markets and addressing any market failures using flexible and creative remedies, robust information gathering powers are essential.

The legal test and the evidential standard the Commission proposes to adopt for the NCT should arguably guide the information gathering powers it proposes to have when investigating under that tool, so that it has the powers it needs to obtain the evidence necessary to meet that standard.

In principle these information gathering powers should match those that the Commission has in the context of antitrust (including its existing powers in relation to sector enquiries) / merger investigations. Further, adopting such powers into the NCT would enable to import the experience, guidance and jurisprudence it has developed using such powers into its use of the new tool.

We note that responding to any regulatory investigation can be burdensome on all parties involved. When exercising its powers we thus encourage the Commission to take into account the burden that investigations have on undertakings, and especially on SMEs.

[37] Competition in a Digital Age: Changing Enforcement for Changing Times, ASCOLA Annual Conference, 26 June 2020.

Question 34: Binding deadlines

In principle binding legal deadlines would be valuable, both to ensure certainty for undertakings and in keeping with the Commission's desire to act quickly. However, deadlines should not be so short so as to curtail proper investigations.

Questions 37-39

Questions 37-39 ask questions relating to the extent to which affected undertakings should be able to comment on (1) a potential finding of a structural competition problem and (2) potential remedies. They also ask whether the NCT should be subject to adequate safeguards including judicial review.

Key messages:

- The NCT should be consistent with the EU's regulatory tradition, a cornerstone of which is robust procedural safeguards and judicial review by the European Courts.
- The procedural safeguards, including access to file, applicable to investigations under Article 101/102 may serve as an appropriate starting point, particularly if the Commission wishes to use the NCT as a basis for imposing interventionist remedies.
- Clearly defined legal tests and evidentiary standards are also essential to ensuring that the European Courts can exercise proper judicial oversight.

The existing European Union competition laws contain robust procedural safeguards to ensure the rights of defence of undertakings concerned and encourage high quality decision making. This practice, supported by the robust judicial review of the European Courts, is an important part of ensuring the Commission's status as a leading global competition enforcer. In designing the NCT, the Commission should have regard to how it can ensure consistency with that regulatory tradition.

The nature of procedural safeguards necessary will depend on the scope of application of the proposed NCT. Assuming that the Commission would have the power to impose interventionist remedies at the end of its proceedings, the rights of entities subject to those proceedings should be akin to those in Regulation 1/2003 for Article 101/102 investigations (which also brings with it related experience, guidance and jurisprudence).

The right to be heard and access to file are essential, especially for undertakings to whom remedies may apply. As with Article 101/102 investigations, this would therefore include the right to comment on the Commission's findings prior to the final decision, and to comment

on the appropriateness and proportionality of the envisaged remedies, to respect the right to be heard.[38]

Another essential part of the European competition law regulatory tradition is proper judicial oversight. For this to be effective, it requires clearly defined legal tests and evidential standards so that the Commission's decision making can be properly scrutinised. Therefore it is important that these are detailed in the legislation. As we noted in our response to the IIA, when it comes to the imposition of remedies, examples of potential precedents include the 'Adverse Effect on Competition' test applicable in the UK market investigation regime, or the 'Significant Impediment to Effective Competition' test in the EU Merger Regulation. There is extensive jurisprudence in respect of each of these tests which could inform the design of the applicable legal threshold for imposing remedies under the NCT.

In designing the regime, the Commission may wish to consider the role of the EU courts, which is particularly important to ensure protection of rights where remedies are imposed, but also whether the Commission would be required to issue an appealable decision following complaints and/or at other preliminary stages.

F. Conclusion

Question 40

Question 40 asks for views, in light of the separate consultation on the Digital Services Act, on the suitability of the following to address market issues raised by online platform ecosystems: current competition rules; a form of gatekeeper regulation; the NCT; and a combination of options.

We agree with the Commission's view that there may be markets which may experience anti-competitive outcomes that cannot be addressed effectively by the Commission's existing competition law enforcement. In principle there are therefore opportunities for modernisation of the EU competition rules to enable the Commission to engage in targeted correction of such outcomes.

This modernisation need not necessarily be dramatic.[39] It could be achieved, for example, through organisational and procedural changes that enable more efficient (and shorter) antitrust proceedings, and by setting up specialised teams with the expertise to assess

[38] As well as respecting this right, it may lead to better-designed remedies. See for example Alexiadis and de Streel's recently: "Given the novelty of many issues that may need to be remedied in the digital economy, combined with the important information asymmetries which prevail between the relevant Authorities and the digital firms, it may be critical in order to ensure the effectiveness of the public intervention to involve the regulated firms in the design of regulatory remedies." Alexiadis, P. and de Streel, Alexandre, Designing an EU Intervention Standard for Digital Platforms, (February 26, 2020). Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14.

[39] See Competition and the Industrial Challenge for the Digital Age, Jean Tirole, April 3, 2020: "*what is needed is not a drastic change in antitrust law […] the regulatory apparatus must be made more agile and in tune with evolving economic thinking in the digital age*".

complex technical matters quickly. Where needed, antitrust investigations could be fortified by (i) targeted use of interim measures; (ii) well-designed remedies; (iii) intervention against specific, harmful forms of anticompetitive conduct (complemented by updated guidance); and (iv) use of a new tool along the lines of the proposed NCT which, if appropriately calibrated and enforced could, in principle, fill an important enforcement gap and ensure pro-competitive outcomes.

Such a tool could provide a useful way of better understanding the relevant markets, including through any framework for more advanced evidence-gathering and analysis, and addressing any market failures using flexible and creative remedies.

We have emphasised in this response the need for case-by-case evidence based decision making. This is particularly important in dynamic markets where predicting outcomes with reasonable certainty is challenging and where the same market features in seemingly similar markets can produce highly different outcomes. This also has the effect of making a set of clearly defined ex ante rules difficult to devise and apply in practice.

We once again thank the Commission for the opportunity to submit a response to its consultation on the NCT. We remain at the Commission's disposal should you wish us to elaborate on any of the points in this submission or on your proposals for the NCT more generally.

SECTION 2: Questionnaire

C. Structural Competition Problems

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)			x		
B - High degree of vertical integration ('Vertical integration' relates to scenarios where the same company owns activities at upstream and			x		

downstream levels of the supply chain)					
C - High start-up costs (i.e. non-recurring costs associated with setting up a business)			x		
D - High fixed operating costs (i. e. costs that do not change with an increase or decrease in the amount of goods or services produced or sold)			x		
E - Regulatory barriers ('Regulatory barriers' refer to regulatory rules that make			x		
F - Importance of patents or copyrights that may prevent entry market entry or expansion more cumbersome or extensively expensive)			x		
G - Information asymmetry on the customer side ('Information asymmetry' occurs when customers (consumers or businesses) in an economic transaction possess substantially less knowledge than the other party so that they cannot make informed decisions)			x		

H - High customer switching costs ('Switching costs' are 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)			x		
I - Lack of access to a given input/asset which is necessary to compete on the market (e.g. access to data)			x		
J - Extreme economies of scale and scope ('Extreme economies of scale' occur when the cost of producing a product or service decreases as the volume of output (i.e. the scale of production) increases. For instance serving an additional consumer on a platform comes at practically zero cost. 'Economies of scope' occur when the production of one good or the provision of a service reduces the cost of producing another related good or service)			x		

K - Strong direct network effects (Where network effects are present, the value of a service increases according to the number of others using it. For instance in case of a social network, a greater number of users increases the value of the network for each user. The more persons are on a given social network, the more persons will join it. The same applies e.g. to phone networks)			x		
L - Strong indirect network effects (Indirect network effects, also known as cross-side effects, typically occur in case of platforms which link at least two user groups and where the value of a good or service for a user of one group increases according to the number of users of the other group. For instance, the more sellers offer goods on an electronic marketplace, the more customers will the marketplace attract and vice versa)			x		
M - Customers typically use one platform (i.e. they predominantly single-home) and cannot easily switch			x		

N - The platform owner is competing with the business users on the platform (so-called dual role situations, for instance the owner of the e-commerce platform that itself sells on the platform)			x		
O - Significant financial strength			x		
P - Zero-pricing markets ('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)			x		
Q - Data dependency ('Data dependency' refers to scenarios where the operation of companies are largely based on big datasets)			x		

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

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.			x		
Anti-competitive monopolisation, where one market player may rapidly acquire market shares due to its capacity to put competitors at a disadvantage in the market unfairly.			x		

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

markets in the long term.)					

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

5000 character(s) maximum

The various market features and types of conduct identified by the Commission in Qs 6 and 7 of the consultation, depending on the circumstances, can give rise to pro-competitive, anti-competitive or competitively neutral results. Accordingly, these features and types of conduct do not lend themselves to *per se* rules: only evidence-driven case-by-case assessments, including where appropriate detailed economic modelling, can help determine whether such market features/types of conduct will lead to anti-competitive results.

For example, in the period leading up to the introduction of the 2004 Merger Regulation, there was debate as to the treatment of efficiencies in EU merger control, and in particular whether they were harmful to competition (as they could give large players scale and efficiency advantages that could not be matched, ultimately leading to a loss of competition) or pro-competitive (with merger-specific efficiencies serving to offset the anti-competitive effect of potentially problematic transactions). Today, it is one of the accepted principles of competition law that efficiencies are generally pro-competitive, both in merger control and under Article 101/102. However, this was not always the case. Robust economic analysis was needed to inform the policy choice as to how to treat efficiencies, not the other way around.

We expand on this response in response to questions 8-19 below and in the accompanying paper uploaded in response to this consultation.

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 a market situation?

Yes | No | Not applicable / no relevant experience or knowledge

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

3000 character(s) maximum

Concerns about companies with market power extending dominance into new markets should not necessarily be limited to digital markets, as the Commission's and Courts' decisional practice shows. The central issues are whether (1) the expansion into the new market is achieved through competition on the merits (e.g. an improved product design) or anticompetitive conduct (e.g. coercive tying, margin squeeze, refusal to supply an indispensable input), and (2) the conduct causes anticompetitive foreclosure in the related market. Companies in the digital sector generally seek to offer innovative products to attract users to their services. Entry and/or expansion in a related market by a company with or without market power (whether as a one off or on a repeated basis) often results in product improvements that benefit consumers and customers. There is nothing inherently anti-competitive in offering a portfolio of complementary products. This can have material benefits to customers (both end consumers and other businesses who may utilise a portfolio of services from a third party to more effectively serve their own customers). At the same time, we understand that, in some cases, these practices may also involve conduct that does not constitute competition on the merits and which forecloses efficient rivals. We expand on this response in the accompanying paper uploaded in response to this consultation.

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

3000 character(s) maximum

Please see the response to Question 8.2.

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

Not applicable / no relevant experience or knowledge
No
Yes, to some extent
Yes, common
Yes, very common

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

3000 character(s) maximum

Please see the response to Question 8.2.

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

Yes | No | Not applicable / no relevant experience or knowledge

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

3000 character(s) maximum

Self-preferencing can be pro- or anti-competitive, depending on the circumstances and the nature of the self-preferencing at issue. There is a recognised risk that self-preferencing can unfairly advantage companies' own services at the expense of efficient rivals without offering adequate countervailing benefits to customers. At the same time, certain practices that could be described as 'self-preferencing' have led to clear product improvements, e.g. Google's practice of showing a map thumbnail at the top of search results and its display of weather information at the top of search results for weather queries. This type of product integration creates a richer search experience and offers more relevant information thereby saving people time, improving discovery, and reducing search costs.

Google believes that the continuing complexity and diversity of digital business models reinforces the importance of a case-specific approach to avoid significant unintended consequences. On the one hand, instances of self-preferencing deserve close scrutiny to ensure that competition and consumers are not being harmed; on the other hand, a blanket approach could deny users the benefits of innovation and product improvements without evidence that a corresponding harm is being addressed.

Presumptions of illegality for platform integrations would apply across a category of different firms, competing in different areas, engaged in many different forms of conduct. This could have several unintended consequences: hampering vertical integration, which is presumptively efficient; eliminating synergies; and leading to delayed or mothballed product improvements. Accordingly, to find practicable and constructive solutions to claims of unequal treatment, it's important to avoid abstract and one-size-fits-all rules.

Instead, concerns of unequal treatment should be assessed based on the facts of a particular case. For example, the following questions may be relevant to the assessment of a new product design: (i) Does the new design confer an undeserved advantage on the company? (ii) Does the design improve quality and benefit consumers (and has the company conducted testing to evidence the quality improvement)? (iii) Is the design a separate product, or part of the main product offered to consumers? (iv) Does the design restrict consumers from

reaching rivals, or does it allow consumers to reach or choose rival services? (v) What is the competitive significance of the design?

Accordingly, a case-by-case assessment is always required to assess allegations about companies with market power entering new markets. Thus, the mere fact that a company may repeatedly enter new markets is not, of itself, problematic.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

Yes | No | Not applicable / no relevant experience or knowledge

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

3000 character(s) maximum

We acknowledge that currently the Commission cannot intervene either (i) where non-dominant companies are engaging in potentially anti-competitive leveraging, or (ii) ex ante where there is a sufficiently high risk of a dominant company engaging in such conduct in the future, as such cases fall outside the scope of Article 102 (and, if there is no agreement/concerted practice, are not caught by Article 101 either). There is, however, a sound principled basis for the scope of Articles 101 and 102. The quasi-criminal nature of any fines imposed means that a 'bad act' must have been committed prior to intervention and in that sense the tools are ex post only. Similarly, there is a reason that Article 102 only applies to dominant undertakings - the likelihood of unilateral conduct resulting in anti-competitive outcomes increases with the degree of market power of the relevant undertaking.

Accordingly, in designing any new rules, the Commission should carefully consider how such new rules could accommodate and facilitate the necessary case-specific analysis, and how best to avoid anti-competitive outcomes without prohibiting or sanctioning conduct that may be competitively neutral or even pro-competitive. The Commission should also ensure that the NCT does not undermine the principles outlined above that have led to the drawing of the boundaries of Articles 101/102.

To the extent there are clear-cut examples of conduct where experience and/or empirical evidence shows are inherently bad for competition, then it is conceivable that a case-by-case analysis would not be required (whether under Articles 101/102 or an NCT) and such types of conduct would lend themselves to being included in a list of per se prohibitions. Examples of conduct where such treatment may be appropriate, as they do not appear to have any pro-competitive rationale, may include product degradation (predatory innovation, such as in Case IV/30.979 and 31.394 *Decca Navigator System*).

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

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

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

3000 character(s) maximum

The Commission's Q10 identifies a broad scope of conduct. The concerns identified may arise in all sectors/markets.

We expand on this response in the accompanying paper uploaded in response to this consultation.

10.3. Please provide examples and explain them.

3000 character(s) maximum

Please see the response to Question 10.2.

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

Not applicable / no relevant experience or knowledge
No
Yes, to some extent
Yes, common

Yes, very common

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

3000 character(s) maximum

Please see the response to Question 10.2.

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

Yes | No | Not applicable / no relevant experience or knowledge

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

3000 character(s) maximum

Though we would agree that, in principle, market situations can arise where one market player is able to put competitors at an unfair disadvantage, we would urge a rigorous approach involving a careful, case-by-case assessment of specific instances, rather than blanket categorisation of a broad range of practices.

In its Q10 the Commission identifies two alleged practices that it appears to consider would be 'anti-competitive monopolisation'. These are each very different and need to be considered separately.

The two practices identified by the Commission are each very different and need to be considered separately.

'Unfair business practices':

'Unfair business practices' is a potentially very broad category of behaviour. For the sake of providing legal certainty and protecting innovation, we would stress the importance of robust and consistent definitions of 'fairness' and evidence-based assessments of the competitive effects of specific practices. In particular, we would caution against defining 'unfairness' in a way that discourages innovation aimed at improving user experience, which can lead to a stronger market position. Our success in Search, for example, stems from investments in innovative new search engine features that users value. The CMA for example has surveyed both consumers and industry participants, acknowledging that "Google's search results are generally perceived to be higher quality than those of Bing".

'Limiting access to key inputs, such as data':

There is a strong case for data use and sharing goals to be effectively and proportionately pursued through existing means and collaborative efforts. Google has adopted an approach

that is open but respectful of users' rights by making large-scale search datasets publicly available for free (e.g., through the Google Trends and Natural Questions tools, along with multiple other free and open source datasets). Though we are committed to open systems, we believe that discussions on 'limiting' versus sharing data access need to take account of the risks of any blanket data-sharing requirement to privacy and incentives to invest.

As we noted in our response to the IIA, we also consider that competition between digital platforms, including through innovation, can be enhanced by measures that let users switch and multi-home without losing access to their data (i.e. portability). In principle, interoperability and data portability may be the solution to the Commission's concerns relating to access to key inputs, subject to the limitations / concerns outlined herein, in our response to the DSA consultation and in our IIA response (e.g. the need to preserve innovation and product quality, and to protect user privacy).

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

Yes | No | Not applicable / no relevant experience or knowledge

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

3000 character(s) maximum

As mentioned in our response to Question 10, 'unfair business practices' and 'limiting access to key inputs, such as data' are each very different and need to be considered separately.

'Unfair business practices': In investigating instances of potentially unfair business practices, the Commission should also be cognisant of whether the NCT will be the most appropriate tool. For example, both Article 102, as Article 102(a) identifies as an abuse "directly or indirectly imposing … unfair trading conditions", and the existing P2B Regulation, which is targeted at addressing unfair business practices, provide alternative mechanisms for intervention.

'Limiting access to key inputs, such as data': Article 102 provides an existing mechanism for companies to seek access to key inputs such as data they need to be able to compete under the refusal to supply doctrine. We note that to date, this doctrine has been interpreted narrowly, partly over concerns that sharing obligations reduce competition and diminish incentives of both the company subject to the obligation and the ones benefiting from it.

As is apparent from our responses to Q10 above, these are not clear cut issues and they require careful case-by-case analysis to determine whether or not there is a potential concern and, if so, how best to address such concern. The NCT could be a tool to facilitate and foster such assessment

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

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

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

Yes | No | Not applicable / no relevant experience or knowledge

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

3000 character(s) maximum

In some cases, oligopolists may be able to behave in a parallel manner and derive benefits from their collective market power without necessarily entering into an anti-competitive agreement or concerted practice. This concern may arise in any market / sector.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

	No knowledge /No experience	No importance /No relevance	Somewhat important	Important	Very important
High concentration levels			x		

Competitors can monitor each other's behaviour			x		
Oligopolists competing against each other in several markets			x		
Homogeneity of products			x		
High barriers to enter (e.g., access to intellectual property rights, high marketing costs, global distribution footprint, strong incumbency advantages, network effects...)			x		
Strong incumbency advantages due to customers' switching costs and/or inertia			x		
Lack of transparency for customers on best offers available in the markets			x		
Vertical integration into key assets of the vertical supply chain			x		
Existence of a clear price leader, resulting in leader- follower behaviour			x		

Please explain your answer and your rating above.

3000 character(s) maximum

In Q12.3 the Commission lists a number of features that may in certain circumstances contribute to the creation of oligopolistic markets. The analysis of whether this leads to a substantial risk of tacit collusion will be fact-specific and requires a case-by-case analysis. Additionally, the analysis must go beyond these factors. It is important to note that certain markets may be most economically efficient with a small number of players, and this does not automatically mean that there is a competition problem.

The analysis of such markets must therefore progress beyond assessing whether an oligopoly has formed or whether there are factors which may make an oligopoly likely in the foreseeable future. This further analysis should focus on the likely outcome of that actual or putative oligopoly on competition. The relevant factors here are well known in competition analysis, e.g. is pricing competitive or is it maintained at supra-competitive levels, do companies continue to innovate and introduce new products and features, can competition be observed in practice e.g. through regular switching.

Whilst not unique to digital platforms, these concerns can arise on both sides of a platform as well as inter-platform. Coordination to game the outcome of platforms' offerings can adversely impact consumers. A recent AdC investigation in Portugal has found that two telecommunications services agreed to limit competition in advertising on the Google search engine. We note that a key question in considering whether to intervene in respect of such conduct will be whether it generates efficiencies that deliver benefits to consumers.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

13.1. Please explain your answer.

3000 character(s) maximum

We acknowledge the need for the Commission to be able to intervene in oligopolistic markets prone to tacit collusion in order to preserve/improve competition. However, Articles 101 (through the concerted practices doctrine) and 102 (through collective dominance) can already be used to address certain concerns of this nature. The Commission should use these tools (including updating/issuing guidance) where possible as a first step, and consider carefully how to identify instances where investigating/intervening with the NCT would be an appropriate

means of conducting the necessary case-by-case analysis. That analysis must both identify the presence or risk of an oligopoly, and determine the nature of the competitive effects produced by that market structure (which could be pro or anti-competitive, or competition neutral). Only once these two questions have been answered can the Commission determine whether intervention (under any tool) would be appropriate.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

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

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

Yes | No | Not applicable / no relevant experience or knowledge

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

3000 character(s) maximum

Pricing algorithms may be used in a wide variety of sectors. We note also that the distinction between whether the goods/services are digital or not does not seem relevant to the use of pricing algorithms.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

	No knowledge /No experience	No importance /No relevance	Somewhat important	Important	Very important

The market is highly transparent (i.e. competitors can easily observe and understand the market behaviour of other players, and align their conduct), even without using the pricing algorithms			x		
The market is not transparent (i. e. without the pricing algorithms, competitors would not be able to observe and understand market behaviour of other players)			x		
Prices might be aligned, without market players explicitly agreeing their prices			x		
The goods and services offered in the market where the pricing algorithms are used are digital			x		
The goods and services offered in the market where the pricing algorithms are used are not digital			x		

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

Not applicable/no relevant experience or knowledge
No

Yes, to some extent
Yes, common
Yes, very common

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

3000 character(s) maximum

Please see the response to Question 14.2

14.7. In your experience, what are the main competition concerns that arise in markets where pricing algorithms are used?

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

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

Yes | No | Not applicable / no relevant experience or knowledge

15.1. Please explain your answer.

3000 character(s) maximum

We note that the report for the Commission "Competition Policy for the digital era" referred to the "*intense academic discussion around the potential for pricing algorithms to enable alignment of prices.*" The Furman review identified two main concerns, first *"That pricing algorithms might help make explicitly collusive agreements more stable, for example by making it easier for businesses to automatically monitor the prices their competitors are offering and detect when they deviate from the collusive agreement."* Second, *"That pricing algorithms could also lead to new forms of tacit collusion – where there is no explicit agreement between businesses to collude, but where pricing algorithms effectively deliver the same result. At the extreme, pricing algorithms drawing on machine learning technology could autonomously learn to collude.* As the Commission has noted, to a large extent, pricing algorithms can be analysed by reference to the traditional reasoning and categories used in EU competition law. Competition authorities have already dealt with cases on the first concern.In a recent joint report the French

and German competition authorities concluded that *"the existing tools seem, at this stage, flexible in their application to cases involving algorithmic behaviour."*

However, Article 101 would not apply if pricing algorithms produce price coordination absent an agreement / concerted practice to that effect. To the extent that the Commission could use a new tool to investigate such concerns, as we noted above in the context of oligopolistic markets / tacit coordination, it would need to undertake a case-by-case analysis to determine whether this creates a problem by in fact reducing price competition and thereby causing consumer harm. This is exemplified, for example, by the Webtaxi case, where competition concerns arising from use of a pricing algorithm between competitors were offset by enhanced efficiency.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

16. So-called tipping (or 'winner takes most') markets are markets where the number of users is a key element for business success: if a firm reaches a critical threshold of customers, it gets a disproportionate advantage in capturing remaining customers. Therefore, due to certain characteristics of that market, only one or very few companies will remain on those markets in the long term.

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

Yes | No | Not applicable / no relevant experience or knowledge

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

3000 character(s) maximum

Certain markets, in a variety of economic sectors and under certain circumstances, may be susceptible to consolidation in the hands of one large player. However, as the authors of the UK report "Unlocking Digital Competition" identified, "Digital markets vary greatly so no general rules apply to all of them. But in many cases tipping can occur once a certain scale is reached, driven by a combination of economies of scale and scope; network externalities whether on the side of the consumer or seller; integration of products, services and hardware; behavioural limitations on the part of consumers for whom defaults and prominence are very important; difficulty in raising capital; and the importance of brands."

A case-by-case analysis is thus required.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

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

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

3000 character(s) maximum

We indicate that each of the above features / elements are somewhat important when seeking to identify a tipping market as in each case an evidence-based individualised assessment is required.

A case-by-case analysis will thus be required to identify markets which are prone to tipping, which market features may lead to tipping, and to determine whether, if so, they would in fact tip and whether subsequent events such as technological developments or market entry would reverse the impact. A strong market position does not preclude the potential for new competitors to arise, as the threat of such competition "*keeps incumbents on their toes*" and leads them to "*innovate to avoid being replaced*".

As identified in various reports such as those referenced above, tipping may occur due to the factors listed by the Commission (network effects, economies of scale and single-homing), and these factors may be present in some digital markets, the digital sector is highly competitive with a vast number of companies and therefore tipping cannot be said to be an inherent characteristic of digital sectors/markets.

In the digital economy, new technologies develop and marketplaces change quickly. For example, small companies can rapidly achieve a prominent position displacing incumbents (e.g., despite only being released globally in 2018, TikTok is now one of the most downloaded apps of the last decade and ranked in sixth place in the global mobile app rankings by monthly active users for 2019).

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

Not applicable/ no relevant experience or knowledge
No
Yes, to some extent
Yes, common
Yes, very common

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

3000 character(s) maximum

Please see our responses to Questions 16.2 and 16.4.

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

	No knowledge /No experience	No importance /No relevance	Somewhat important	Important	Very important

Efficient or innovative market players will disappear			x		
There will not be sufficient competition on the market in the long run			x		
Customers will not have enough choice			x		
Customers may face insufficient innovation			x		
Customers may face higher prices			x		

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

3000 character(s) maximum

We indicate that each of the above features / elements are somewhat important when seeking to identify competition concerns in a tipping market as in each case an evidence-based individualised assessment is required.

Please see further our responses to Questions 16.2 and 16.4.

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

Yes | No | Not applicable / no relevant experience or knowledge

17.1. Please explain your answer.

3000 character(s) maximum

As we note above, a case-by-case analysis is required to identify markets which are prone to tipping, which market features may lead to tipping, and to determine whether, if so, they would

in fact tip and whether subsequent events such as technological developments or market entry would revere the impact.

The competition concerns relating to tipping may not be addressed fully by Article 101 (there is no agreement / concerted practice) and Article 102 (the firm(s) may not yet be dominant, and the concerns may not necessarily be an abuse). Thus there may be a case for the Commission to intervene in some markets that it identifies are at risk of tipping in cases where it may not be able to do so currently.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

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

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

Yes | No | Not applicable / no relevant experience or knowledge

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

3000 character(s) maximum

The Commission appears to consider gatekeepers as large online platforms driven by strong economies of scale and direct and indirect network effects who increasingly act as private gatekeepers to critical online activities for an exceptionally large population of private and business users. As explained further in our response to the consultation on the proposed Gatekeeper Regulation, identifying which firms qualify as gatekeepers is a complex exercise that requires further analysis.

The advantage of the NCT, as the Commission appears to envisage it, is that it would be flexible enough to investigate competition concerns in a market without needing to label a subset of platforms as 'gatekeepers'. As we noted in our response to the IIA, if the threshold in, for example an ex ante regulation, is that a platform is a 'gatekeeper', then the Commission would need to consider carefully how to define 'gatekeeper' platforms in a clear and certain way that is sufficiently future-proof.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

Not applicable/no relevant experience or knowledge
No
Yes, to some extent
Yes, common
Yes, very common

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

3000 character(s) maximum

The Commission's concern in the digital sector appears to relate to "*some large online platforms benefitting from significant network effects and acting as gatekeepers*". Nevertheless, the relevance of network effects, other factors, and countervailing factors (multi-homing etc.), varies between markets, and therefore it would be difficult to characterise gatekeeper scenarios as "common" in digital sectors/markets. The Commission should also be cautious in condemning network effects, which can create virtuous cycles and encourage pro-competitive behaviour by the platform on both sides of the market in certain circumstances.[40] A case-by-case assessment is needed to identify a gatekeeper, its ability and incentives negatively to affect competition, and pro-competitive benefits. App platforms, for example, though characterised by some as 'gatekeepers', have been widely recognised as driving innovation and growth in the app economy.

The Commission's approach to gatekeepers appears to date to be focused on "online platforms" and thus to that extent the gatekeeper scenarios posited by the Commission occur in digital markets. However we note that one side of a digital platform may be retail, with digital being only one channel in a wider market(s). Also, there may be gatekeepers in markets such as electronic communications, and more traditional essential facilities (e.g. ports). Thus depending on the definition adopted, gatekeepers may not be limited to the digital sector.

We expand on this response in the accompanying paper uploaded in response to this consultation.

[40] See, e.g.: http://faculty.haas.berkeley.edu/HERMALIN/armstrong.pdf.

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

Not applicable / no relevant experience or knowledge | No | Yes

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

3000 character(s) maximum

Please see our response to questions 18.2 and 18.4 above.

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

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

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

3000 character(s) maximum

Each of the factors posited by the Commission in Q18.7 may be relevant to varying degrees in a particular industry, and this may change over time. As such a case-by-case analysis is required to identify which companies may qualify as a gatekeeper in a particular market.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

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

accepting their terms and conditions					

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

3000 character(s) maximum

Each of the factors posited by the Commission in Q18.9 may be relevant to varying degrees in a particular industry, and this may change over time. In a recent Deloitte report, one EU developer described app platforms as offering "great opportunities, a fantastic medium" for developers. As such a case-by-case analysis is required to identify whether an undertaking's role as a gatekeeper gives rise to any potential competition problems.

Further, we note that the mere presence of a 'gatekeeper' does not necessarily give rise to competition concerns and may generate pro-competitive effects, which would need to be taken into account in any analysis of the effect on competition. For example, whilst some may label Google, Apple, Facebook, and/or Amazon as gatekeeper platforms, as we noted in our response to the IIA these four companies are reported to be some of the largest investors in R&D, as reflected in the 2018 Global Innovation 1000 study. Google has consistently spent over 15% of its revenues on R&D since 2016. By contrast, the average 'R&D ratio' in the EU is 3.4%.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

Yes | No | Not applicable / no relevant experience or knowledge

19.1. Please explain your answer.

3000 character(s) maximum

To the extent that the Commission identifies competition concerns relating to gatekeepers, then we acknowledge that there may be an enforcement gap with respect to existing competition law tools. Notably, in the context of Article 101 there may not be a relevant agreement / concerted practice; and in the context of Article 102 either the gatekeeper may not be dominant, or the behaviour at issue may not be an abuse. Thus there may be a case for the Commission to intervene where it identifies competition concerns arising from a firm being a 'gatekeeper'.

In this regard, the contemplated NCT could provide a useful way of better understanding the relevant markets, including through any framework for more advanced evidence-gathering and analysis, and addressing any market failures using flexible and creative remedies. The flexibility of the contemplated NCT may be particularly useful in the context of gatekeepers given that a case-by-case analysis is required to identify any competition concern, and balance these concerns against any pro-competitive benefits from the platform under consideration.

As we identified in our response to the IIA and expanded upon in our response to the Digital Services Act consultation in respect of the proposed gatekeeper regulation, the solution to the 'gatekeeper' concerns may comprise a package of complementary reforms. New regulations could address issues that fall outside the scope of competition law, but which are important for digital markets to function in a fair, efficient manner (e.g., ensuring data portability, appropriate levels of transparency, and fairness in contractual relations). It appears to us at this initial stage that some of these measures could be important whatever the size or market position of the digital platform at issue. Similarly, as one looks back at the unpredictable nature of historic innovation and tries to imagine what kinds of digital products and services European consumers will be using in the future, it seems reasonable to assume that notions of 'gatekeeper', 'platform', and even 'digital' will need to be robust and flexible. The NCT could have a valuable role in any such package of reforms, enabling evidence based case-by-case assessment where the object of the Commission's concerns falls outside the scope of existing (or future) ex ante regulation.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

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

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

3000 character(s) maximum

Many of the factors relating to structural competition problems identified by the Commission in its IIA related to digital markets. However, it is not necessarily the case that structural risks for competition and structural lack of competition are limited to digital markets.

Under the UK's market investigation tool, which we understand to be an inspiration for the NCT, "*As well as being able to look into the conduct of firms, the [CMA] can probe for other causes of possible [Adverse Effects on Competition], such as structural aspects of the market (including barriers to entry and expansion) or the conduct of customers.*" In its guidance on the tool, the CMA identifies a variety of structural features it has identified, in a variety of markets. The CMA has, by way of illustration, intervened in respect of the supply of energy, retail banking services, airports and aggregates, amongst others.

It is also a general principle of EU competition law that it applies universally, without regard to the nationality of the company, its owners, or sector. As such, should the Commission propose a narrow NCT, for example limited to digital markets, it should enunciate clearly the basis on the reasons for excluding certain sectors, and consider carefully whether this undermines the universal application of competition law.

We note in this regard comments by Executive Vice President Vestager in a recent speech: "*Many of the biggest issues that this tool could help us resolve are linked to digital markets. But I doubt that it would make sense to apply it only to these markets – instead of covering the whole economy, as our existing competition powers do. That's partly because the sort of issues I've discussed come up in many other markets as well. In fact, the Greek, Icelandic and British competition authorities have so far only used this type of power in markets that aren't digital. It's also because the digital transition is affecting pretty much every industry there is. So it's hard to draw the line between what's digital and what isn't – especially when you consider that the rules we come up with now should be ready for the future, when that line may get even more blurred.*" EVP Vestager has also commented that "*Neutrality is a guiding principle of everything we do. When we take our decisions, we have to follow where the evidence and law lead us, and treat every business the same. However big or small they are, and wherever they come from*".

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

A case-by-case assessment is required to determine whether particular structural competition problems can be addressed using Article 101.

We agree that on the basis of the concerns identified by the Commission there may be opportunities to modernise the EU competition law framework. However in some instances where existing competition law may be the appropriate tool. The Commission's assessment of which tool to use to address a particular problem in a particular sector would require an evidence based, case-by-case assessment, and therefore the legislator should be cautious of legislating in advance to limit a particular tool to markets/ sectors with particular characteristics.

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

3000 character(s) maximum

Please see our response to Question 22.1.

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

A case-by-case assessment is required to determine whether particular structural competition problems can be addressed using Article 102.

We agree that on the basis of the concerns identified by the Commission there may be opportunities to modernise the EU competition law framework. However in some instances where existing competition law may be the appropriate tool. The Commission's assessment of which tool to use to address a particular problem in a particular sector would require an evidence based, case-by-case assessment, and therefore the legislator should be cautious of legislating in advance to limit a particular tool to markets/ sectors with particular characteristics.

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

3000 character(s) maximum

Please see the response to Question 23.1.

D. Assessment of Policy Options

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

Several of the proposals that are now under consideration by the Commission have the potential to promote competition and innovation in the EEA. For example, we have long supported enhanced data portability, which facilitates switching, multi-homing, and provides opportunities for new players to enter or expand in digital markets. Providing better access to aggregated datasets could benefit research and development in a range of industries while also safeguarding user data privacy.

The contemplated NCT could provide a useful way of better understanding markets, including through any framework for more advanced evidence-gathering and analysis, and addressing any market failures using flexible and creative remedies. It could also allow for efficient consolidation of complaints, expedite evidence-based inquiry by including all relevant market participants in an investigation.

Evidence will continue to be core to the question of whether or not firms are competing on the merits. For example, integration between different products or services can promote or restrict competition. Our experience has been that telling the difference often requires a detailed, case-by-case and fact-based assessment of the effects on consumer welfare. It may, therefore, make more sense to adapt existing antitrust tools and procedures to allow assessments to be carried out more swiftly and effectively. This could be achieved, for example, through organisational and procedural changes that enable more efficient (and shorter) proceedings, and by setting up specialised teams with the expertise to assess complex technical matters. Where needed, antitrust investigations could be fortified by: (i) targeted use of interim measures; (ii) well-designed remedies; (iii) intervention against specific, harmful forms of conduct (complemented by updated guidance); and (iv) use of a new tool along the lines of the proposed NCT.

Finally, we note that engaged dialogue between firms and regulators can lead to change, outside formal investigations. For example, following discussions with the Commission, Google launched choice carousels to enhance the visibility of rival search services and provide additional choice for consumers. Google displays choice carousels that list third party search services above specialised results for flights, hotels, local businesses, and jobs. In these carousels, Google shows links to search services, together with logos or images, in a scrollable horizontal row. These carousels give users additional choices without depriving them of the benefits of the specialised results.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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.

3000 character(s) maximum

We understand that the Commission contemplates using the NCT both ex post, i.e. to identify and address competition concerns in a market with a structural lack of competition, and also

on an ex ante basis, i.e. to identify and address such concerns where there is a structural risk to competition.

When investigating ex ante risks, there is inherent uncertainty as to whether harm will arise, in particular in fast-moving digital markets characterised by high levels of investment and innovation. Accordingly, such intervention should involve a case-by-case assessment before any ex ante remedy (or indeed ex ante regulation) is put in place. Otherwise there is a risk of chilling innovation to the detriment of consumers. Under existing case law, the Commission has to meet a high standard when intervening against prospective harms; this can only be met through a case-by-case assessment.

We thus consider that the contemplated NCT is a useful way of better understanding markets, including through a framework for more advanced evidence-gathering and analysis. This makes the NCT the correct tool to conduct an assessment of markets where there is a structural risk to competition, as it can consider the evidence on a case-by-case basis before making ex ante interventions to avoid structural risks to competition materialising into a structural lack of competition.

We discuss the remedies framework further below but we note here that ex ante intervention to address structural risks to competition should be accompanied by a suitable remedies framework which allows measures which steer market developments away from competition issues towards a more competitive outcome. For example, following its retail banking market investigation the CMA implemented 'Open Banking', a means of sharing consumer and SME banking data amongst providers using an API so as to encourage entry and switching. Such interventions can allow markets to develop into more competitive structures (or avoid developing into anti-competitive structures) without further intervention including intrusive changes to existing market structures.

Staged interventions can also be an effective means of tackling such issues - see our discussion of the approach of the CMA in its "Online platforms and digital advertising market study" in response to questions 30-32 below.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

It is likely that structural concerns in markets will vary market-to-market, and may change over time. Thus what may be important for competition in one market may not be important for competition in another market. As such, flexibility and future proofing will be important considerations in the design of a NCT.

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

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

3000 character(s) maximum

In terms of whether the NCT should be limited to dominant companies only, we note Executive Vice President Vestager's comments that "The rules we have today can't stop big companies from pushing markets towards the tipping point, unless those companies are already dominant in a market. And that isn't just an issue in digital markets. In the last two decades, four-fifths of Europe's industries have become more concentrated, with the biggest companies taking an ever larger share of the market."

We agree with this sentiment, and note that setting dominance as a threshold for intervention raises the risk of the NCT not being able to address structural (rather than firm-specific) competition problems.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

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

3000 character(s) maximum

In terms of whether the NCT should apply to all or a limited category of markets, we consider it a valid question as to whether legislation could identify sufficiently precisely the sectors to be covered by the NCT in a way that can take account of future market developments, particularly in fast-paced and technology-driven industries. By contrast, a generally applicable NCT could provide the Commission with sufficient flexibility to address structural and other competition-related issues.

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

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

In terms of how the NCT would interact with a range of existing rules and regulations, we note that minimising duplication between different legislation is important so as to enhance legal certainty. As we identified in our IIA response, some considerations governing whether or not a new tool ought to be deployed may include:

(1) EU vs national regimes: how the NCT will interact with equivalent tools at the Member State level, the role of subsidiarity, the risk of conflicting outcomes, and whether a 'one-stop-shop' principle may be appropriate;

(2) Interaction with the current sector inquiry regime: the Commission appears to envisage the current EU sector inquiry regime continuing to exist in parallel. The Commission should consider the basis on which it would choose between a sector inquiry or deploying the NCT, and whether there is scope for formalising the interaction between the two tools;

(3) Interaction with other EU legislation (e.g., Article 101/102): the Commission posits that the NCT will be used to address structural competition problems that cannot adequately be addressed by the existing legislation. The consultation could therefore consider how and at what stage in an investigation it will identify whether it is appropriate to proceed with the NCT or other EU legislation (for example, one option would be to draw inspiration from the UK market investigation regime, where the CMA's guidance provides that it will not make a market investigation reference where an investigation under the Competition Act (containing the UK domestic equivalents of Articles 101 and 102) is more appropriate); and

(4) Interaction with ex ante regulation: the consultation could also consider how the NCT and any ex ante regulation (including the new regulation discussed in this paper) will interact and how it will design the overall regime so as to ensure legal certainty. In particular, to provide certainty and predictability for businesses, it will be important to minimise overlaps so that companies do not have to confront multiple regulatory regimes with the same aim.

Done well, targeted enforcement combined with sector specific regulation can be an effective means of delivering change. The implementation of 'Open Banking' in the UK following the CMA's retail banking market investigation and its interaction with the Second Payment Services Directive is an example of this.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

	Yes	No	Not applicable /no relevant experience or knowledge
Make non-binding recommendations to companies (e.g. proposing codes of conducts and best practices)	x		
Inform and make recommendations/proposals to sectorial regulators	x		
Inform and make legislative recommendations	x		
Impose remedies on companies to deal with identified and demonstrated structural competition problems	x		

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

3000 character(s) maximum

The NCT potentially applies to a broad range of market sectors and a broad range of potential concerns. Further, as set out in response to Qs 27 and 28 above, Google would support the NCT being adopted in the broadest form proposed by the Commission, applying to all sectors of the economy and all markets in which structural competition problems may be present, without requiring dominance as a threshold for intervention.

Against that background, we support inclusion in the legislation of each of the four options posited by the Commission in Q30, and, within the Commission's ability to impose remedies,

the three options posited in Q31. An appropriate range of remedial tools is important to ensuring that the remedy framework can effectively address structural competition problems whilst also preserving existing market dynamics that do not contribute to those problems, as we set out in our response to the IIA. I.e. in designing the remedies framework the Commission should be guided by the principles of effectiveness, proportionality and flexibility.

As we explained in our response to the IIA, an important issue the Commission should consider when designing the provisions which will permit it to impose remedies is the legal test and evidentiary standard that will apply. When imposing remedies, precedents exist in a number of regimes, for example the 'Adverse Effect on Competition' test applicable in the UK market investigation regime, or the 'Significant Impediment to Effective Competition' test in the EU Merger Regulation. Both of these examples carry extensive jurisprudence on both the legal test and the associated evidentiary standard. Google would also support the adoption of flexible standards, with higher standards applicable for stricter or more interventionist remedies.

Whilst we support the NCT being supported by a broad range of remedial tools, we consider that it is important that those tools are utilised within the correct confines. Part of this is satisfying the appropriate legal test as we note above. In addition, the Commission should not use the NCT to introduce remedies (or a series of remedies) that better fall within the purview of new legislation following the appropriate legislative procedure. Seeking to address through antitrust enforcement matters which are better dealt with through legislation can produce potentially prolonged periods of legal uncertainty and poor outcomes.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

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

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

3000 character(s) maximum

As set out in response to question 30.1, we are supportive of the NCT being accompanied by a broad range of remedial tools. We would however note that the imposition of structural remedies should be a last resort following rigorous analysis.

Structural remedies are potentially highly draconian and risk significant adverse effects on incentives to invest and attendant chilling effects on innovation. They also risk unintended consequences and potentially adverse future market developments (i.e. they risk "throwing the baby out with the bathwater"). This is particularly so in rapidly developing sectors, as for example 'digitised' sectors typically are. If the target of a structural remedy is not sufficiently stable, implementing it may carry costs that outweigh any benefits of intervention.

Accordingly, the imposition of structural remedies should be subject to a suitably high legal threshold and evidentiary burden. The Commission should proceed cautiously, only imposing structural remedies where it is satisfied that intervention is justified and no other solution is available (including where appropriate pursuing other, less intrusive, remedial measures first as outlined above).

The Commission should consider how to deploy the remedial tools at its disposal to adjust the degree of intervention it adopts overtime so as to ensure that the appropriate balance between addressing competitive harm and preserving non-problematic existing market characteristics is consistently struck overtime.

Part of this will involve the Commission considering how to readily permit revision or revocation of remedies. As we noted in response to the IIA, this will be of particular importance in dynamic markets where market developments may render remedial measures no longer appropriate. In addition, there will likely be scenarios where it is appropriate for the Commission to introduce remedies on a phased basis, beginning with the least intrusive measures and giving such measures adequate opportunities to deliver competitive change before introducing further measures.

A staged approach to remedy implementation is just one way the Commission can ensure that the appropriate balance is struck between addressing potential concerns and preserving existing market dynamics which do not contribute to these concerns. We acknowledge it may not be appropriate in all circumstances, particularly where prompt action may be needed. However, it does illustrate the value in a broad range of remedial options, and the valuable flexibility in approach that would be lost if the legislation is cast narrowly.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

Yes | No | Not applicable / no relevant experience or knowledge | Other

If you indicated "Other", please explain.

3000 character(s) maximum

The result of the broad scope of the NCT, is that it would be applicable to a potentially very broad range of structural competition problems. One virtue of a properly designed and implemented NCT is that it will allow evidence driven case-by-case assessments of potential structural competition problems and the measures, if any, required to remedy such problems which may include, as a measure of last resort, structural remedies. We accordingly caution against seeking to identify at the outset potential candidates for the imposition of structural remedies.

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

Given that the contemplated NCT could provide a useful way of better understanding markets and addressing any market failures using flexible and creative remedies, robust information gathering powers are essential.

The legal test and the evidential standard the Commission proposes to adopt for the NCT should arguably guide the information gathering powers it proposes to have when investigating under that tool, so that it has the powers it needs to obtain the evidence necessary to meet that standard.

In principle these information gathering powers should match those that the Commission has in the context of antitrust (including its existing powers in relation to sector enquiries) / merger investigations. Further, adopting such powers into the NCT would enable to import the experience, guidance and jurisprudence it has developed using such powers into its use of the new tool.

We note that responding to any regulatory investigation can be burdensome on all parties involved. When exercising its powers we thus encourage the Commission to take into account the burden that investigations have on undertakings, and especially on SMEs.

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

	No knowledge /No experience	No importance /No relevance	Somewhat important	Important	Very important
Addressing requests for information to companies, including an obligation to reply				x	
Imposing penalties for not replying to requests for information				x	
Imposing penalties for providing incomplete or misleading information in reply to requests for information				x	
The power to interview company management and personnel				x	

Imposing penalties for not submitting to interviews				x	
The power to obtain expert opinions				x	
The power to carry out inspections at companies				x	
Imposing penalties for not submitting to inspections at companies				x	

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

3000 character(s) maximum

Please see the response to Question 33.1.

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

In principle binding legal deadlines would be valuable, both to ensure certainty for undertakings and in keeping with the Commission's desire to act quickly. However, deadlines should not be so short so as to curtail proper investigations.

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

As we set out in our response to the IIA, rather than adopting an ex ante regulatory framework, it may be more appropriate to adapt existing antitrust tools and procedures to allow assessments to be carried out more swiftly and effectively. We suggested that one element of this may be fortifying antitrust investigations by the targeted use of interim measures only for obvious and egregious abuses that cause serious and irreparable harm. We also suggested other fortifying measures, where needed: well-designed remedies; intervention against specific, harmful forms of self-preferencing (complemented by updated guidance); and use of a new tool along the lines of the proposed NCT. A further example we provided was for organisational and procedural changes that enable more efficient (and shorter) proceedings, and the setting up specialised teams with the expertise to assess complex technical matters.

To include the possibility to impose interim measures in the NCT, we encourage the Commission to clearly identify a gap between interim measures in antitrust investigations on the one hand and ex ante enforcement via the NCT on the other. Otherwise, the overlapping regimes may lead to legal uncertainty.

In designing an interim measures regime, we encourage the Commission to have regard to the same overall factors as we suggest for the remedies regime, i.e. flexibility, effectiveness and proportionality. Particularly, for interim measures it will be important to ensure that measures are withdrawn when no longer necessary, or where the burden of having them in place outweighs their benefits.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

Google supports enabling the Commission to accept voluntary remedies, as is the case in its Article 101/102 investigations, including at different stages of the process (analogous to offering commitments to avoid a reference to Phase 2 in merger control, or the 'undertakings

in lieu' in the UK market investigation regime). This would ensure flexibility and proportionality in the regime.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

The existing European Union competition laws contain robust procedural safeguards to ensure the rights of defence of undertakings concerned and encourage high quality decision making. This practice, supported by the robust judicial review of the European Courts, is an important part of ensuring the Commission's status as a leading global competition enforcer. In designing the NCT, the Commission should have regard to how it can ensure consistency with that regulatory tradition.

The nature of procedural safeguards necessary will depend on the scope of application of the proposed NCT. Assuming that the Commission would have the power to impose interventionist remedies at the end of its proceedings, the rights of entities subject to those proceedings should be akin to those in Regulation 1/2003 for Article 101/102 investigations (which also brings with it related experience, guidance and jurisprudence).

The right to be heard and access to file are essential, especially for undertakings to whom remedies may apply. As with Article 101/102 investigations, this would therefore include the right to comment on the Commission's findings prior to the final decision, and to comment on the appropriateness and proportionality of the envisaged remedies, to respect the right to be heard.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

Please see the response to Question 37.1.

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

Yes | No | Not applicable / no relevant experience or knowledge

39.1. Please explain your answer.

3000 character(s) maximum

Another essential part of the European competition law regulatory tradition is proper judicial oversight. For this to be effective, it requires clearly defined legal tests and evidential standards so that the Commission's decision making can be properly scrutinised. Therefore it is important that these are detailed in the legislation. As we noted in our response to the IIA, when it comes to the imposition of remedies, examples of potential precedents include the 'Adverse Effect on Competition' test applicable in the UK market investigation regime, or the 'Significant Impediment to Effective Competition' test in the EU Merger Regulation. There is extensive jurisprudence in respect of each of these tests which could inform the design of the applicable legal threshold for imposing remedies under the NCT.

In designing the regime, the Commission may wish to consider the role of the EU courts, which is particularly important to ensure protection of rights where remedies are imposed, but also whether the Commission would be required to issue an appealable decision following complaints and/or at other preliminary stages.

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

3000 character(s) maximum

Please see our response to Questions 37.1 and 39.1.

F. Concluding Questions

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

suitability of each option below to address market issues raised by online platform ecosystems.

	Not applicable /No relevant experience or knowledge	Not effective	Somewhat effective	Sufficiently effective	Very effective	Most effective
1. Current competition rules are enough to address issues raised in digital markets	x					
2. There is a need for an additional regulatory framework imposing obligations and prohibitions that are generally applicable to all online platforms with gatekeeper power	x					

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

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

3000 character(s) maximum

We believe that a combination of the options listed above could address perceived concerns relating to digital platforms. Which tool is most suitable in a given case will depend on the particular issue at hand.

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

3000 character(s) maximum

We agree with the Commission's view that there may be markets which may experience anti-competitive outcomes that cannot be addressed effectively by the Commission's existing competition law enforcement. In principle there are therefore opportunities for modernisation of the EU competition rules to enable the Commission to engage in targeted correction of such outcomes.

This modernisation need not necessarily be dramatic. It could be achieved, for example, through organisational and procedural changes that enable more efficient (and shorter) antitrust proceedings, and by setting up specialised teams with the expertise to assess complex technical matters quickly. Where needed, antitrust investigations could be fortified by (i) targeted use of interim measures; (ii) well-designed remedies; (iii) intervention against specific, harmful forms of anticompetitive conduct (complemented by updated guidance); and (iv) use of a new tool along the lines of the proposed NCT which, if appropriately calibrated and enforced could, in principle, fill an important enforcement gap and ensure pro-competitive outcomes.

Such a tool could provide a useful way of better understanding the relevant markets, including through any framework for more advanced evidence-gathering and analysis, and addressing any market failures using flexible and creative remedies.

We have emphasised in this response the need for case-by-case evidence based decision making. This is particularly important in dynamic markets where predicting outcomes with reasonable certainty is challenging and where the same market features in seemingly similar markets can produce highly different outcomes. This also has the effect of making a set of clearly defined ex ante rules difficult to devise and apply in practice.

We expand on this response in the accompanying paper uploaded in response to this consultation.

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

Yes | No

[END]