



30 June, 2020

CCIA Feedback on Inception Impact Assessment for Proposed “New Competition Tool”

The Computer & Communications Industry Association (“CCIA”) welcomes this opportunity to provide feedback on the European Commission’s Inception Impact Assessment (“IIA”) for the New Competition Tool (“NCT”)ⁱ. CCIA also looks forward to responding to the questionnaireⁱⁱ and participating in the related consultation process.

CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. CCIA is committed to protecting and advancing the interests of our members, the industry as a whole, as well as society’s beneficial interest in open markets, open systems and open networks.

CCIA supports the Commission’s continued focus on strengthening the Digital Single Market (“DSM”). The Commission Staff Working Document to the Single Market Performance Report 2019 (SWD(2019)444 final) cites several divergences amongst Member States that are hampering European DSM performance including varying levels of digital skills, digitisation in companies, digital infrastructure, and availability of venture funding. We also note that in addition to these issues, there may be certain “structural competition problems” hampering the DSM which would be best addressed at EU level.

However, the IIA and questionnaire identify several “structural competition problems” which do not by themselves appear to be competition problems at all. In particular:

- **“Tipping markets” are not problematic.** Many investments are made in start-ups on the basis that they can be recovered once sufficient scale is achieved. The characteristic of “tipping” is itself related to the increased value that users derive from the network effects. Where such characteristics are present, preventing tipping would mean worse outcomes for consumers.
- **“Leveraging” into adjacent markets is not inherently problematic.** Where a firm has transferable skills and resources, leveraging those for market entry leads to increased efficient competition in those adjacent markets and hence better outcomes for users. Any intervention should carefully distinguish between pro-competitive and anti-competitive leveraging.
- **Unilateral strategies by non-dominant companies are unlikely to be problematic.** The concept of dominance is inherently flexible. It applies where a company has the ability to distort competition, and is increasingly applied to narrow market segments. By definition, a non-dominant company is unlikely to have the market power sufficient to produce an anticompetitive effect on the market.
- **High entry barriers are a characteristic common to several industries.** The question is whether a competitor with a superior business model or product could contest an incumbent, and/or whether the threat of such entry is sufficient pressure to ensure efficient market outcomes.
- To the extent that issues are related to consumer behaviour (e.g. the prevalence of multi-homing), **consumer focused interventions that address root causes**, like lack of digital skills, are likely more effective than industry-level interventions.



If the Commission presumes that each of the above are inherently problematic and must be addressed by competition intervention, then Europe's DSM performance will likely be hampered further.

CCIA is particularly concerned by the weight that the questionnaire places on theories of harm related to digital sectors, while ignoring the one area where we believe "structural competition problems" are most likely to appear, namely, common ownership / horizontal shareholdings. See Elhauge "Tackling Horizontal Shareholding" OECD (DAF/COMP/WD(2017)95). The absence of this point is particularly concerning given the Commission's clear identification and analysis of these structural issues in two recent high-profile merger cases, Dow / DuPont (2017) and Bayer / Monsanto (2018).

Finally, CCIA submits that, contrary to what is indicated in the IIA, the Commission should at least consider one option for action that would not grant it the power to impose structural remedies.

Respectfully submitted,

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References

ⁱ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation>

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