

## ACT PERSPECTIVES ON THE NEW COMPETITION TOOL

### OBJECTIVE

The ACT welcomes a holistic approach to competition policy that serves Europe's fundamental goals in matters of cultural diversity and media pluralism. By delivering a level playing field, competition rules can be a real game changer to ensure Europe's creative media ecosystems – part of Europe's priority CCI ecosystem – remain vibrant drivers of Europe's employment and GDP. We welcome the reflection on much needed ex-ante rules aimed at larger online platforms as well as the update of the Market Definition notice as the necessary first steps in the strategic re-thinking of the competition framework. The anticompetitive practices of large online platforms acting as gatekeepers hampers the ability of broadcasters as pure content players to compete on equal terms. Over the years, the Commission and some NCAs have undertaken several enforcement initiatives against these players. However, in many cases these have proved insufficient to restore effective competition or to prevent further anticompetitive conducts. The platforms' dual role as distributors/publishers of content and their dominance in multiple activities across online market value chains generates disproportionate market power in markets in which they operate and potentially in new markets they seek to enter.

For broadcasters, at the heart of Europe's audiovisual production and distribution sectors, there is an opportunity to address a number of concerns and ensure competition policy is fit for the challenges posed by new technologies in order to drive Europe's media strategy and support a robust, responsible and reliable media landscape.

### OPPORTUNITIES

The existing toolbox of competition tools has proven to be insufficient: either too slow or too complex or simply ineffective at providing adequate remedies. The ACT welcomes the Consultation on the New Competition Tool which complements the other proposed pillars in the Commission's approach to deliver a pro-competitive landscape.

The New Competition Tool would ideally ensure an agile framework to resolve structural issues that radically change market dynamics at present determined by a handful of global tech operators with unprecedented market power. A modern and agile competition policy, based on structural remedies which could address specific behaviors, even though dominance in the specific market is not yet evident, would also be in line with the French Senate's information report published in July 2020<sup>1</sup>.

We consider the proposed New Competition Tool as an element complementary to the current competition toolbox based on Art. 101 and 102 of the Treaty. We suggest that the scope be limited to online platforms acting as gatekeepers on digital markets characterised by their capacity to build extremes economies of scale and scope, strong network effects, zero pricing and data dependency. The approach should be focused on digital firms with an intensive valuable data accumulation capacity and an extreme market size, identified either by looking at market capitalisation or by looking at customer base and ability to lock in those customers e.g. when moving into a new sector. In the identification of the relevant players, it is also important to identify a wide set of strategic digital services (e.g. social media, search, online marketplaces) that are essential to achieve data dominance which allows for market tipping. Ultimately, those systemic platforms should be defined in strict consistency with the definition which will be used for the application of ex ante rules in the Digital Services Act.

### CHALLENGES

The articulation of the rules and instruments foreseen will be key. The immediate challenge will be to ensure the envisaged tool finds a clean fit in the existing and foreseen competition policies.

As such, the goal of the NCT should be to help address gaps in Articles 101 and 102 TFEU without displacing their

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<sup>1</sup> <http://www.senat.fr/rap/r19-603/r19-6031.pdf>

enforcement. It should be aimed at cases in which a market distortion is not specifically related to a conduct undertaken by an already dominant firm - which may be more appropriately addressed through an investigation under Article 102. The criteria outlining the likelihood of a market tipping need to be robust so as to be consistently applied.

The new tool will also need to be very clear on remedies, while allowing proper rights of defense and evidence standards. This will ensure the Tool to be properly fit for the specific purpose it is aimed at tackling and applies to services and avoids targeting companies that may be able to bring more competition to the markets in question. As such, the substantive tests to be put in place will also require more clarification with clear guidelines.

Finally, beside the need for a legislative intervention, it is worth noticing that competition authorities in their daily practice should better consider competitive distortions within the framework of the current competition law by adapting their practice to better reflect new market realities and the huge power of global digital players (e.g. adapt the definition of relevant markets, review and widen the criterion of “consumer welfare” so as not to only limit this to pricing considerations, etc.).

## CONCLUDING REMARKS

While we are in favour of the holistic approach proposed of the EC and recognise the potential benefits of a potential NCT in very specific cases, broadcasters would advise that the tool, its application and basis, be clarified on several levels. This tool will need to be extremely well scoped to ensure it tackles the emerging challenges of the platform economy.

We support the general objectives of a New Competition Tool – consisting in ensuring a strong enforcement of existing rules and tackling structural competition problems – and look forward to better understanding its scope and aims.

The introduction of much needed ex-ante rules aimed at large online platforms acting as gatekeeper and the update of the Market Definition Notice are also needed to reshape the competitive environment. Therefore, we welcome a New Competition Tool which, as outlined by Executive Vice-President Vestager in her statement to the US Congress prior the Hearing of tech CEOs on 29 July 2020, “would complement both existing case enforcement under Articles 101 and 102 of the EU Treaty, as well as the possible ex ante regulation that would apply to digital gatekeeper platforms”.

## ABOUT THE ASSOCIATION OF COMMERCIAL TELEVISION IN EUROPE (ACT)

The European commercial broadcasting sector is a major success story. We entertain and inform hundreds of millions of EU citizens each day via thousands of channels available across Europe. The Association of Commercial Television in Europe represents the interests of 29 leading commercial broadcasters across Europe. The ACT member companies finance, produce, promote and distribute content and services benefiting millions of Europeans across all platforms. At ACT we believe that the healthy and sustainable commercial broadcasting sector has an important role to play in the European economy, society and culture.



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