

# FACEBOOK

June 30, 2020

## **Facebook Observations to the Inception Impact Assessment on the “New Competition Tool” (NCT)**

### **1. Introduction**

Facebook welcomes the opportunity to provide its insights and observations in response to the proposal by the European Commission ("Commission") for a New Competition Tool ("NCT"). This submission presents Facebook's summary observations on selected areas of the Commission's Inception Impact Assessment (IIA). Facebook looks forward to engaging with the Commission and stakeholders across the industry to further evaluate whether reforms are needed and, if so, what form they might take. As a company, Facebook is committed to working with policymakers and regulators, to build a regulatory framework that protects and enhances consumer choice, continues to spur innovation, and provides more opportunities for consumer-driven choice.

Indeed, recognising the “[i]nternet has entered a new phase”, Facebook understands that the oversight of technology’s role in our lives also needs to evolve. It is in this context that Mark Zuckerberg, Facebook’s CEO, has called for a “more active role for governments and regulators” so that “by updating the rules for the internet, we can preserve what’s best about it – the freedom for people to express themselves and for entrepreneurs to build new things – while also protecting society from broader harms”.<sup>1</sup>

Facebook continues to call for, and we are already engaging in a structured and forward-looking dialogue around regulation that we think is important for the evolution of the rulebook for the internet. We have outlined four areas; harmful content, election integrity, privacy and data portability - which we are very keen to continue to explore both in the Digital Services Act (DSA) process and beyond. In that context, we have already taken proactive steps to further understanding and discussion. A good example is our White Paper on ‘Data Portability and Privacy’ aimed at advancing the policy discussion on how to advance data portability in a privacy-protective way.

Facebook is a strong believer in the elimination of barriers to trade and innovation. A European Single Market that is well functioning and offering the prerequisite conditions to economic growth should be the objective of regulatory intervention. Facebook’s services are a spur to the Single Market, and offer European businesses, both large and small, the ability to maximise their opportunities. Facebook believes that this is good for jobs, good for growth and good for the European Union.

In this context, the Commission has launched an Inception Impact Assessment (“NCT IIA”) to canvass stakeholder views on the proposed NCT. The underlying assumption behind the NCT is that extensive

<sup>1</sup> Mark Zuckerberg, *The Washington Post*, March 30, 2019.

powers already conferred on authorities under existing competition laws are insufficient to address a range of perceived harms. In fact, the NCT IIA claims that digitisation and the characteristics of digitalized markets create unavoidable structural competition problems that cannot be addressed at all or effectively by Articles 101 and 102 TFEU.

The reality of any major regulatory intervention is that there are trade-offs and opportunity costs. A proper assessment of the trade-offs can be achieved by weighing the evidence of the extent and nature of any perceived problem against the various benefits that result from a particular course of conduct and then assessing the likely impact of intervention. Such a cost / benefit approach provides legitimacy to any proposals for change, minimizes unintended negative consequences and thus maximizes the likelihood of success of reforms.

The NCT IIA makes a number of relevant observations about the nature of digital markets in the European Union and the difficulties of potential options for regulatory reform. Facebook welcomes, in particular, the NCT IIA's recognition of the volume of cross-border trade within the Union, the pan-European nature of many market players in the digital space, and the risk that fragmented rules may create legal uncertainty and barriers for companies operating in the internal market. The NCT IIA also acknowledges the difficulty of distinguishing between digital and non-digital industries, given that all sectors of the economy exhibit some degree of digitisation. The NCT IIA notes, further, that characteristics sometimes attributed to digital markets, such as network effects, scale/scope economies, and data dependency "can also be found in non-digital markets".<sup>2</sup> While Facebook welcomes these observations, there are a number of important omissions in the NCT IIA.

The remainder of this submission explores how there could be greater consideration given as to whether there truly is an enforcement gap which could justify an instrument as far-reaching as the NCT. Our present view is that the evidence does not support such a conclusion (Section 2). Insofar as the Commission might nevertheless be minded to ask for substantial new market regulation powers through the introduction of a NCT, a meaningful cost / benefit assessment should be conducted, capable of providing a sound basis for balanced policy-making (Section 3). The NCT IIA's broad assumptions as to market dynamics and the current absence of a meaningful cost / benefit assessment, to the contrary, could lead to skewed proposals for reform, may underestimate the need for meaningful checks and balances, and may fail to anticipate the unintended consequences of intervention (Section 4). It would also lead to unfounded assumptions around notions such as "gatekeepers" or "tipping markets" (Sections 5 and 6). The absence of a meaningful cost / benefit assessment is accompanied by the use of general assumptions in relation to, among other things networks effects and the impact of data use and little recognition of the benefits of the free to consumer business model in certain areas of activity (Section 7) and the potential for "efficiency offences"; the hallmark of a natural and pro-competitive business behaviour (Section 8). Finally, this submission considers the risk of overlapping regulatory proposals at EU and national level which could undermine the Single Market imperative, sow regulatory confusion and create legal uncertainty for companies (Section 9).

## **2. Competition law already addresses competition concerns in digitally enabled markets**

<sup>2</sup> European Commission's Inception Impact Assessment on a New Competition Tool ("NCT IIA"), p. 1.

The NCT IIA identifies two types of “structural competition problems” that the Commission’s existing enforcement toolkit cannot address:

- “Structural risks for competition” where “certain market characteristics [...] and the conduct of the companies operating in the markets create a threat for competition” (emphasis added), with “tipping markets”, “[companies occupying] an entrenched and/or gatekeeper position”, and “unilateral strategies by non-dominant companies to monopolise”.<sup>3</sup>
- “Structural market failure”, such as where a market is “displaying systemic failures going beyond the conduct of a particular company with market power” and “oligopolistic market structures with an increased risk for tacit collusion”.<sup>4</sup>

However, insofar as the NCT would apply to unilateral conduct, it is not apparent that there is an “enforcement gap” even if such dynamics were at play.

The TFEU gives clear powers to the Commission to take action to tackle two distinct and clearly articulated scenarios. EU competition law today distinguishes between agreements and concerted practices between independent undertakings, which may be caught by Article 101 TFEU, and unilateral conduct which may be caught by Article 102 TFEU. The European Courts have consistently held that unilateral conduct only falls within the scope of EU competition law if the company at issue is dominant.<sup>5</sup> To date, there has been no evidence-based claim that the Treaty leaves a meaningful “enforcement gap” with respect to anti-competitive unilateral conduct.

Far from leaving an “enforcement gap”, in fact, the existing framework for EU competition law enforcement has shown itself to be remarkably adept at treating novel or complex issues, including issues that may arise in “digitally-enabled” sectors, such as two-sided markets, zero-price factors, and innovation theories of harm. For example, in recent years, the Commission has demonstrated that Articles 101 and 102 TFEU are flexible enough to engage with novel theories of harm, including new leveraging strategies (i.e. better positioning and display);<sup>6</sup> pre-installation through e.g., tying;<sup>7</sup> exclusivity requirements (including on placement);<sup>8</sup> and, most-favoured-nation clauses, not only with regard to price MFNs but also with regard to business model MFNs.<sup>9</sup> Such practices have, moreover, arisen across a range of different industries, ranging from basic industries, pharmaceuticals, retail industries to finance and insurance. The Commission’s decisional practice therefore provides no evidence that existing competition law tools are unable to address novel issues relating to the digitisation of the economy. In fact, quite the reverse.

<sup>3</sup> NCT IIA, p. 2.

<sup>4</sup> NCT IIA, p. 2.

<sup>5</sup> Joined Cases C-2/01 P and C-3/01 P, paras. 100-101 (“the existence of an agreement [prohibited by Article 101(1) TFEU] [...] can be deduced from the conduct of the parties concerned. However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others [...] [this] would have the effect of confusing the scope of that provision with that of Article [102 TFEU].”)

<sup>6</sup> Case AT. 39740 – Google Search (Shopping), Commission Decision of 27 June 2017.

<sup>7</sup> Case AT.40099 – Google Android, Commission Decision of 18 July 2018; Case M.8124 – Microsoft/LinkedIn, Commission Decision of 6 December 2016.

<sup>8</sup> Case AT.40099 – Google Android, Commission Decision of 18 July 2018; Case AT. 40411 – Google AdSense (Commission decision not yet published);

<sup>9</sup> Case AT.40153 – E-book MFNs and related matters (Amazon), Commission Decision of 4 May 2017.

It would therefore seem to be the case that the core of the Commission’s proposal is not to address an “enforcement gap”, i.e., to expand the Commission’s current toolkit in order to capture established forms of anti-competitive conduct that currently fall within a lacuna in the law. Indeed, the NCT IIA lists various forms of conduct that are already susceptible to prohibition under Article 102 TFEU, when engaged in by dominant companies. Instead, the Commission appears to envisage lowering the legal and evidentiary standard for intervention in order to allow it to act and impose remedies in respect of unilateral conduct “without any prior finding of an infringement pursuant to Article 102 TFEU”<sup>10</sup> (Options 1 and 2), by companies that are not dominant on a relevant market (Options 3 and 4). In some respects, the justification for lowering the legal and evidentiary burden appears to rest on an assumed ability to forecast developments in markets that are fast-moving and dynamic, and in which outcomes are inherently uncertain.

The Commission’s proposals, if enacted, would therefore mark a significant shift in legal and regulatory enforcement. Reforms of such significance should only be introduced following a meaningful cost / benefit assessment, with due consideration of the checks and balances necessary to provide oversight of how this broad regulatory discretion is exercised.

### **3. The need for a meaningful assessment of the costs and benefits of expanding enforcement in digitally-enabled markets**

The NCT IIA does not appear to propose any meaningful evaluation of the costs and benefits of reform. Currently, the NCT IIA lists a series of undesirable market features, such as “extreme economies of scale and scope, strong network effects [...] data dependency, as well as market dynamics favouring sudden and radical decreases in competition” and states in conclusory fashion that “these characteristics are typical for digital markets”.<sup>11</sup>

However, the Questionnaire for the public consultation on a New Competition Tool (“NCT Questionnaire”) accompanying the NCT IIA does not include a question asking respondents to discuss the benefits of online services and the digitisation of the economy and how these benefits are generated. Moreover, the NCT IIA does not discuss consumer benefit from more intervention and appears to assume that only companies subject to the tool will bear its costs: “consumer benefits deriving from the timely intervention under all policy options should outweigh [increased] costs [for the companies concerned]”.<sup>12</sup>

Facebook would encourage the Commission to remedy this omission during the consultation process so as to provide an opportunity for a balanced assessment of the benefits conferred by digitisation. There is substantial evidence that digital platforms, including advertising-funded platforms such as Facebook, have generated significant benefits for competition and consumers:

- Facebook’s advertising-supported services which enable users to communicate, to connect and share with their friends, families and wider communities, and discover meaningful and relevant

<sup>10</sup> NCT IIA, p. 3.

<sup>11</sup> NCT IIA, p. 1.

<sup>12</sup> NCT IIA, p. 4 (emphasis added).

content free of charge. A recent research study shows that digital goods, and in particular Facebook, have created large gains in consumer welfare.<sup>13</sup>

- Moreover, online platforms such as Facebook have helped to democratise advertising, creating effective advertising opportunities for many businesses for which traditional alternatives, such as TV advertising or newspapers, would be too expensive or inefficient. Advertisers of all kinds and sizes can advertise and benefit from the affordable, innovative and efficient advertising solutions that online platforms have driven and brought to the market. These have enabled advertisers (and particularly SMEs) to reach their target audience more efficiently and cost-effectively and thus achieve a greater return on their investment. As a result, SMEs can now reach their target audiences more efficiently and compete with and challenge much larger, more established businesses, more effectively, including in concentrated industries. This democratisation of advertising generates additional benefits in the form of greater choice and innovation for customers.
- In fact, Facebook commissioned a study by Copenhagen Economics which surveyed 7,000 businesses across Europe. Businesses surveyed emphasised the importance of technology in helping them reach markets abroad and, in particular, the contribution of Facebook to the growth of European businesses:
  - Facebook’s services helped these businesses generate over 98 billion euros in exports last year;
  - Seven in ten businesses using Facebook’s services export to other countries compared with five in ten for non-users; and
  - Six in ten of the businesses surveyed say that Facebook’s services are helpful in entering new markets.<sup>14</sup>

These are just a few of the significant benefits that may be generated by advertising-funded online platforms and Facebook specifically. Yet the Commission’s consultation offers stakeholders no opportunity to make these points.

As the Commission considers the expansion of its enforcement toolkit, it should weigh both the innovation in the digital sector and the benefits this innovation delivers to people and businesses. Such innovation is both enabled and funded by advertising.

A proper assessment of the trade-offs could be achieved by weighing the evidence of the extent and nature of any perceived problem to be resolved against the impact on various types of benefits from a particular course of conduct, and then assessing the costs/benefits of any intervention. A detailed assessment of this nature would enhance the legitimacy of any proposals for change, sharpen the identification of potential areas of concerns, minimize unintended negative consequences and thus maximise the likelihood that any such proposals would be successful.

<sup>13</sup> Erik Brynjolfsson, Avinash Collis and Felix Eggers, Using massive online choice experiments to measure changes in well-being, 9 April 2019, p. 3, available at: <https://www.pnas.org/content/pnas/116/15/7250.full.pdf>.

<sup>14</sup> Copenhagen Economics, Empowering the European Business Ecosystem – an impact study of business using Facebook apps and technologies, 2020, available at: [https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/2/522/1579535391/empowering-the-europeanbusiness-ecosystem\\_copenhagen-economics.pdf](https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/2/522/1579535391/empowering-the-europeanbusiness-ecosystem_copenhagen-economics.pdf)

#### **4. The need for appropriate checks and balances**

The NCT IIA advocates far-reaching reforms. In particular, the NCT IIA suggests that the Commission would not have to establish dominance and/or an abuse under Article 102 TFEU in order to sanction unilateral conduct (while at the same time apparently assuming that such unilateral conduct would only be harmful in the presence of “market power”). The Commission would also seemingly have the power to impose wide-ranging structural and behavioral remedies to address conduct which does not amount to an infringement of the law. Insofar as such broad regulatory discretion was introduced, it would have to be accompanied by a highly detailed consideration of what checks and balances might be needed to oversee these potentially sweeping discretionary enforcement powers.

At present, the NCT IIA and NCT Questionnaire contain no clear limiting principles and mandate no specific procedural or substantive checks or balances. The NCT IIA (particularly under Options 3 and 4) proposes to endow the Commission with largely uncircumscribed powers to intervene not only in “markets displaying systemic failures” but also to make an “early intervention” on a predictive basis in markets wherever it believes there is a “threat [to] competition”.<sup>15</sup> There are references to “tipping markets”<sup>16</sup> (a concept which the NCT Questionnaire defines in imprecise fashion) and cases where “a (not necessarily dominant) company [is] relying on large amounts of data” “to extend its market position to related markets”<sup>17</sup> but the published materials do not provide a prescriptive list of scenarios for intervention. While the NCT IIA consultation refers briefly to the importance of “[taking] into account the rights of defence and the right to judicial review”,<sup>18</sup> the requirement for appropriate checks and balances is otherwise left undeveloped. The NCT Questionnaire merely asks respondents whether the NCT “should” be subject to “adequate procedural safeguards, including judicial review” before inviting respondents to volunteer suggestions.<sup>19</sup>

As Facebook has observed, meaningful safeguards are essential to counterbalance the envisaged new powers. By way of comparison, the UK Markets Investigation regime (from which the NCT appears to draw inspiration) entails various procedural and substantive checks and balances, which collectively seek to ensure that interventions are only made where proportionate and necessary, on the basis of robust evidence, and with full rights of defence. Facebook urges the Commission to use its consultation process to conduct an exhaustive examination of which safeguards and guardrails would be appropriate for the NCT, beginning from the presumption that robust procedural rights are part of a system that works to guarantee better decision-making.

#### **5. The broad notion of the “Gatekeeper”**

The Commission explains in the NCT IIA that in the wake of digitisation a limited number of large platforms have become “gatekeepers” for many digital and non-digital products and services. According to the NCT IIA, this development raises structural competition problems that the NCT aims to address. There is, however, no clear definition of the concept of a “gatekeeper”.

<sup>15</sup> NCT IIA, p. 2.

<sup>16</sup> For a preliminary definition of tipping markets see NCT Questionnaire, section 7, p. 18.

<sup>17</sup> Questionnaire for the public consultation on a New Competition Tool (“NCT Questionnaire”), Section 8.1, p. 19.

<sup>18</sup> NCT IIA, p. 4.

<sup>19</sup> NCT Questionnaire, Section 39, p. 44.

The NCT Questionnaire explains that “[s]o-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.” The subsequent questions list only three factors for determining whether a company is a “gatekeeper”:<sup>20</sup>

- “High number of customers/users.”
- “Customers cannot easily switch (lack of multi-homing).”
- “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”.<sup>21</sup>

Facebook respectfully submits that these various elements are unacceptably vague. Just looking at the language used, it is unclear whether “high” means a large absolute number or a percentage of the relevant population. There is no indication whether “easily” means it must in fact be difficult. Such amorphous terms are unsuitable for determining whether a company is a “gatekeeper” and whether there is a “structural competition problem”<sup>22</sup> that cannot be adequately addressed by the existing EU competition rules.

For instance, it is unclear why mere possession of data and other inputs would make a company a “gatekeeper”. Due to digitisation, a very large number of companies operating in the single market collect data.

Similarly, it is not clear why having many customers or a large user base is relevant to determining whether a company is a “gatekeeper”. The key question must be whether there is a ‘gate’ and a ‘keeper’ and not the number of users or customers behind the notional gate. For example, in the energy sector, a company that controls the pipelines that bring natural gas to consumers in a given network area is a gatekeeper vis-à-vis the consumers that are connected to the pipeline system. When the pipeline operator is vertically integrated, competitors must pass through this pipeline gateway to reach those consumers. There may be no other cost-effective way to reach them and the company that controls the pipeline system is a gatekeeper regardless of the number of users in the network area. There may be cases where an online service similarly controls a gateway to consumers, but the size of the customer or user base is not relevant to the assessment of whether that is the case unless it is also accompanied by clear evidence that those customers cannot be reached otherwise.

A company should also not be considered a “gatekeeper” simply because there are switching barriers and an absence in practice of multi-homing. Multi-homing means that consumers simultaneously use two or more competing products or services. Most markets are not characterized by multi-homing, yet there are no “gatekeepers” and no “structural competition problems”.

Finally, Facebook questions the assumptions behind the criterion on business operators needing to “accept the conditions of competition of the platform – including its business environment – to reach the customers that use the specific platform”. Any platform that is open to users – whether businesses or final consumers – must determine the user experience and the conditions for engaging on the platform.

<sup>20</sup> NCT Questionnaire, Section 18, p. 31.

<sup>21</sup> NCT Questionnaire, Section 18.7, p. 33.

<sup>22</sup> For a definition of structural competition problems, see NCT Questionnaire, Section C, p. 9-10.

Otherwise the platform descends into anarchy. This is true for any business. A shopping centre operator determines the design of the stores, how and where they are located and the rental fees. A food supplier may prefer to rent space in the food court. However, a refusal to do so does not mean that the shopping centre operator is a “gatekeeper” or that there is a “structural competition problem”. The online world is no different in this regard.

Facebook would also raise similar concerns in relation to the assumptions in the NCT Questionnaire as to the main competition concerns that arise in relation to markets featuring a “gatekeeper”:

- “Gatekeepers determine the dynamics of competition on the aftermarket/platform.
- As customers/users cannot easily switch, they have to accept the competitive environment on the aftermarket /platform.
- Business operators can only reach the customers that use the specific platform/aftermarket by adapting their business model and accepting their terms and conditions”.<sup>23</sup>

A platform that connects businesses and consumers must necessarily define how that interaction operates. For example, a ride-hailing service enables taxi drivers and consumers in need of transportation to connect. In order to provide a well-functioning service, the service must necessarily determine a certain number of parameters including the minimum standard that a taxi must meet, the number of taxis that may be offered and the maximum distance and waiting time that is considered acceptable. Does that give rise to competition concerns? If taxi drivers and consumers do not like the user experience, they can choose a competing ride-hailing service. Moreover, in the zero-price environment, customers are able to switch at a moment’s notice.

Similarly, it would not be workable to believe that companies that serve businesses can have individualized terms and conditions. The use of standard terms and conditions is what makes it possible to grow at scale. A model based on individually-negotiated terms would materially increase transaction costs and cause substantial delays onboarding new customers, regardless of the sector. It is also not clear why a refusal to offer standard terms to all would not then be treated as discriminatory.

There is a wealth of literature regarding why the controls over unilateral behaviour are limited to entities in a dominant position. The points above highlight why an evidence-based finding of dominance remains the appropriate predicate for further assessing unilateral conduct in a given defined antitrust market.

## **6. A catch-all definition of gatekeepers?**

The NCT IIA and the NCT Questionnaire give the impression that all large online platforms have common features that make them “gatekeepers”. The reality is that a very broad and heterogeneous collection of companies engage in online activity. The only characteristic that the platforms have in common is that they use the Internet to provide their services. The great variety in terms of business models and services is illustrated by the following examples:

<sup>23</sup> NCT Questionnaire, Section 18.7, p. 33,

- Amazon, eBay, Zalando are platforms that sell products online to consumers and provide fulfilment services. Even then, Amazon sells many products in its own name, whereas eBay does not.
- Deliveroo and UberEats are takeaway food platforms that effectively allow all restaurants to operate as takeaways, connecting consumers who pay for the meals and restaurants which pay a fee for the services.
- Facebook, TikTok, Snap, Twitter, Zoom, and LinkedIn offer users the ability to communicate, discover, share and create content.
- Farfetch is an online luxury fashion marketplace that enables fashion boutiques and brands to sell their inventory against payment of a commission.
- Google is first and foremost an online search and advertising company that enables users to discover information on the Internet.
- Lyft and Uber are mobility platforms that connect drivers and consumers in need of transportation. Consumers pay for the transportation service and the platform operator obtains a revenue share.
- Netflix is an online subscription service offering Netflix original content and third-party content. Amazon, Disney, HBO and many others offer competing subscription services offering access to their own original content and in some cases third-party content.
- Salesforce provides a cloud-based customer relationship management service to businesses. Salesforce also operates an AppExchange, which provides access to compatible business apps.
- Spotify, Deezer, Apple Music, and YouTube Music all offer music streaming services with differing business models.

As these examples illustrate, online services are highly differentiated and each service should be assessed case-by-case on its own merits. There is no one-size-fits-all and there can be no presumption that just because a service is delivered online there is a risk of “structural competition problems” that can only be addressed using a new competition enforcement tool. In any event, the case-by-case tool that would allow such a nuanced and evidence-based assessment – the dominance framework under Article 102 TFEU – already exists and is fit for purpose.

## **7. The misleading assumptions underpinning the NCT IIA**

The perceived need for an NCT to deal with “structural competition problems” caused by “large platforms”<sup>24</sup> appears to be based on a number of misleading assumptions and fallacies.

- *The data fallacy.* Data is a valuable input used in virtually all human activity. As the Commission acknowledges in the NCT IIA, the differences between digital and non-digital markets will become increasingly blurred. A key reason for this is that all industries collect and use data. Data is abundant and is very rarely a source of market power.
- *The network effects fallacy.* The rhetoric that platforms benefit from “global” network effects benefits so that each new user benefits the entire network does not reflect reality. In practice,

<sup>24</sup> NCT IIA, p. 1.

network effects are mostly local and divided into sub- or micro-networks within the larger user base. For example, Uber connects drivers and consumers needing transportation in various cities across Europe but serves local demand in each of the cities in which it operates. The fact that Uber operates in many Member States hardly makes it a “gatekeeper” in cities where it faces competition from taxi companies, private hire vehicles and other online dispatching services.

- *The user base fallacy.* Having a large number of users does not mean that a service benefits from strong direct or indirect network effects. Such an assertion confuses network effects with mere scale. In many instances it just means that consumers like the user experience. A platform that has millions of users may capture only a small fraction of addressable demand. Conversely, a platform that has a relatively small user base in absolute terms may capture a high share of addressable demand.
- *The tipping fallacy.* The NCT IIA gives the impression that tipping risks are pervasive in online services. The reality is that there are very few markets where the relationship between service quality and scale is such that there might be a real risk of tipping. Typically, several services coexist and compete with differentiated offerings and user experiences.
- *The zero price fallacy.* Offering free or sharply discounted products and services is very common. Indeed, it is increasingly the case that products are carriers of services that are monetized. Zero pricing is not indicative of “structural competition problems” but it might well be indicative of substantial consumer benefits and a feature of multi-sided businesses. Indeed, the ad-supported, free-to-consumer business model provides an invaluable growth path for start-ups and new entrants, of which TikTok is just the latest example. Nobody seriously suggests that “free” newspapers or ad-funded commercial television is inherently problematic.

In Facebook’s view, platforms that truly are “gatekeepers” are subject to Article 102 TFEU. Moreover, Article 102 TFEU (like Article 101 TFEU) has the benefit of being enforced case-by-case based on a careful assessment of the facts. The requirement to find an infringement ensures that obligations to change market conduct are based on established legal principles and thorough analysis. Indeed, under Article 17 of Regulation 1/2003<sup>25</sup> the Commission must initiate antitrust investigations in order to address findings in a sector inquiry that competition in a particular sector is not functioning well.

## **8. Entry into new markets and the efficiency offense**

The NCT IIA makes the statement that “[s]tructural 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.” What appears to be considered a structural competition problem is, in fact, an essential part of the competitive process. Any company, digital or physical, which seeks to enter a new area of activity will seek to make efficient use of existing assets to reduce cost and increase the likelihood of successful entry. That is the essence of product development and innovation. As the economy digitizes, data is just one that is used to fuel innovation and enter into new areas of activity.

Entry into neighboring or adjacent markets is typically easier and more likely to succeed than entering an entirely new area of activity. That is why conglomerates tend to be active in sectors that have

<sup>25</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

commonalities in terms of technology, infrastructure and marketing assets. GE developed its first jet engine in 1942. A few years later it developed its first gas turbine for power generation. Today, GE is a leading manufacturer of turbines for aircraft, conventional power generation and wind power. While each technology is different, there are commonalities that help save cost and push technological boundaries. Supermarket chains like Carrefour and Intermarché have used existing real estate to enter fuel distribution and compete with incumbents like BP, Shell and Total. In so doing, they have also offered additional value to their existing customer base by enabling shoppers to fill their tanks before or after filling their trunks with groceries. Mobile network operators have built upon their existing technological assets and user base to deliver financial services (e.g., Orange, which has launched Orange Bank). Telecoms companies have also expanded into e.g., pay-tv services from their existing networks and user bases. The ability to redeploy existing assets and skills is part of the essence of competition and that is as true for online businesses as it is for offline business such as Carrefour and GE.

People use Facebook's services in varied and constantly evolving ways to discover, share, and connect with meaningful and relevant content. Facebook strives to facilitate these interactions and enhance people's experiences through its services. In response to users' evolving preferences, Facebook is continuously innovating to improve its existing offering and offer new services and features that users will find valuable; as these few examples illustrate: News Feed (2006), Facebook Chat (2008), Like button (2009), Timeline (2011), Facebook Camera (2012), Facebook Groups (2014), 360 Video on Facebook (2015), Facebook Marketplace (2016), Facebook Stories (2017), Instagram TV (2018), and Messenger Rooms (2020). All these innovations and improvements represent organic growth of product offerings in response to user demand and preferences.

For instance:

- Facebook Groups were introduced to enable group communication around a common issue, a communication feature that was previously lacking on the Facebook Service. Any user can create a group for a common issue or activity to organize, express objectives, discuss issues, post photos, and share related content.
- Facebook Stories were launched primarily in response to users' increasing preference for sharing photo and video content. They enable users to share pictures and videos, adding filters and effects.
- In a similar vein, due to the increasing demand for video services to stay connected with friends and family, Facebook recently introduced Messenger Rooms, which allow users to video call their contacts in a 'virtual room.'
- Facebook's Marketplace was developed primarily to address and enhance buy-and-sell interactions between users that were organically already taking place on Facebook. Facebook observed that users were increasingly using Facebook to buy and sell items and decided to launch Marketplace in October 2016; a tailored surface dedicated to enabling users to buy and sell items on Facebook. This development has enhanced the user experience and further facilitated these existing, organic interactions where users sought to either buy or sell their items. Marketplace offers an alternative to more established incumbents such as Amazon, Google, and eBay.

All of these examples illustrate why the use of data and other assets to create new products and services does not rely upon market power. Under Article 102, market extension abuse arises when restrictive conduct in one market is likely to extend dominance to another market. Tying is an example. Dominance in the tying product is leveraged to require customers to purchase the tied product, thereby potentially foreclosing suppliers of the tied product. The competition issue is not the mere use of existing assets to enter new markets; it is specific conduct that forecloses competition. In the 2004 and 2009 Microsoft decisions regarding integration of Windows Media Player and Internet Explorer with Windows, the abuse was not adding new features to Windows; it was preventing PC OEMs and users from removing those features, thereby extending Microsoft's PC OS dominance to related markets.

## **9. Proliferation of overlapping enforcement tools**

In a press release announcing the NCT IIA, the Commission stated that the initiative would be “without prejudice to existing sector-specific regulation” and the “existing competition tools currently available to [...] the national competition authorities of the EU Member States” while being “complementary to the [...] initiative on platform-specific ex ante regulation”.<sup>26</sup>

However, far from defining a complementary relationship, with clear division of competence, the NCT appears to substantially duplicate existing and anticipated enforcement tools at the EU and Member State level.

### **A: The NCT overlaps with the proposed Commission ex ante regulatory tool.**

The NCT IIA explains that the NCT is “complementary to the Commission’s new initiative on platform-specific ex ante regulation, which seeks to provide a fair trading environment for the platform ecosystems”.<sup>27</sup> Although purportedly “complementary”, the Commission’s ex ante regulation and NCT projects appear substantially similar. The envisaged ex ante regulatory instrument would specifically target “large online platforms” deemed to be “acting as gatekeepers” benefitting from “significant network effects”.<sup>28</sup> The NCT, similarly, identifies market positions of “entrenched dominance”, “gatekeeper position[s]” and “network and scale effects” among the structural competition problems meriting application of the tool.<sup>29</sup> Yet while the scope of these partially duplicative initiatives is not conclusively determined, the Commission has already resolved that they will be administered by different Directorates-General (CNECT and COMP, respectively). The parallel proposals therefore create a risk of a lack of clarity as to competence, inconsistent enforcement, and a duplicative compliance burden for the businesses concerned. Facebook has also submitted a response to the Ex-ante “Gatekeeper” IIA consultation, and we would like to point to the argumentation and points raised there - Just as the two consultations reference the interplay between the two proposals, Facebook’s responses are also complementary.

### **B: The NCT overlaps with expected national legislative initiatives.**

<sup>26</sup> European Commission press release, Brussels, 2 June 2020; NCT IIA, p. 2.

<sup>27</sup> NCT IIA, p. 2.

<sup>28</sup> Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union’s internal market Inception Impact Assessment (“ex-ante regulation IIA”), p. 1.

<sup>29</sup> NCT IIA, pp. 2-5.

The NCT IIA acknowledges that “several EU Member States have called for changes [...] to the existing competition rules” and that some “have prepared legislative proposals for amendments”<sup>30</sup> to their national laws. However, the NCT IIA does not explain how the division of competence between the Commission and Member States will operate in practice. There would need to be consideration of this point given that several Member State initiatives are regulatory in character or target unilateral conduct beyond the scope of Article 102 TFEU and would therefore fall outside the division of competence provided for in Regulation 1/2003.<sup>31</sup>

In short, the proliferation of partially duplicative enforcement tools entails a substantial burden to business and increases the risk of inconsistent outcomes. Facebook is reassured by the Commission’s recognition that many market players now have pan-European business models – such that competition enforcement in one Member State invariably entails an adjustment in business practices across several or all Member States. Facebook therefore assumes that one of the aims of the NCT IIA is to achieve some harmonization of the various Member State initiatives and that would be welcome. Indeed, it would be unfortunate if all of the initiatives were to lead to increased regulatory burden on businesses operating within the Union, cutting across the stated aim of the Commission to promote a well-functioning Single Market.

## **10. Conclusion**

Billions of people have come online in the past decade, gaining unprecedented access to information and the ability to share their ideas and opinions with a wide audience. However, there are also costs to this rapid acceleration in access to information. Disruption to established industries, the emergence of new business models, and vigorous competition produce winners and losers.

Facebook therefore welcomes further discussion and reflection on the fitness of the Commission’s enforcement powers. Indeed, Facebook itself has called for regulation that focuses on preserving innovation and protecting consumers. Yet, designing a workable and effective regulatory framework is a challenging task since the risk in uprooting the current rules is that we take a dim view of conduct that is actually pro-competitive, pro-innovation and benefits European consumers. That is why the Commission’s consultation must be grounded firmly in a detailed and nuanced weighting of the costs and benefits of intervention.

Facebook looks forward to a constructive discussion with the Commission and stakeholders on these proposals.

### **For more information, please contact:**

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<sup>30</sup> NCT IIA, p. 2.

<sup>31</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.