Consultation on the European Commission's Inception Impact Assessment

Concerning the possible Ex Ante Regulation of Platforms and the New Competition Tool

Google's Submission
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Table of contents

1. Introduction

We welcome the opportunity to respond to the European Commission's Inception Impact Assessments concerning the possible ex ante regulation of platforms and the new competition tool (NCT).

Well-designed regulation benefits suppliers, customers, and consumers in digital markets. Independent regulators give consumers confidence that their interests are being protected as they shop, search, and socialize online. And business customers will be more likely to use intermediary platforms in the long-run if they are protected against opaque or unfair practices.
We believe we are well-placed to contribute ideas and evidence to the discussion of how existing competition rules can be modernised for the digital age. We have combined our initial thoughts on the NCT and ex ante regulations in one document. A careful interrogation of the concerns that the reform hopes to address will likely lead to different types of solutions that will need to apply in concert.

We believe it will be important to ensure that legislative changes preserve platforms' ability and incentives to innovate and invest and are applied consistently and with clear standards. European consumers and small businesses benefit from the services that platforms offer. Overly broad or unclear rules will reduce innovation and consumer welfare. And inconsistent regulation will distort competition.

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. And 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.

In some cases, we do believe that 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. An ex ante framework may not always allow for that kind of approach. 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 self-preferencing (complemented by updated guidance); and (iv) use of a new tool along the lines of the proposed NCT.

In sum, we believe that there are opportunities for modernisation. The solution to 'gatekeeper' concerns is likely to 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). While it is hard to argue for a particular scope of application, it does seem 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.

This initial submission is structured as follows: Section 2 offers some suggestions for overarching principles for assessing the contemplated reforms. Section 3 discusses some considerations concerning the potential addressees of any new ex ante regulations. Section 4 discusses the proposed NCT measure. Section 5 concludes. We understand that people will look to us to provide the data and evidence to ensure that change is effective. We stand ready to do that and look forward to being part of the discussion.

2. General Principles

Competition law, precedent, and practice have established a framework of principles for assessing how interventions might impact the competitive process, customers, and consumers. While the aim is clear -- to promote competition and to serve the consumer interest -- achieving this sometimes requires difficult balancing exercises. This approach is relevant to assessing regulatory interventions, just as it is relevant to assessing conduct and remedies in antitrust proceedings. Accordingly, in thinking about possible interventions, we believe the following principles should be borne in mind.

Innovation of all kinds should be preserved and fostered. Digital platforms emerged from private investment, innovation, and perseverance. Google, Apple, Facebook, and Amazon are reported to be some of the largest investors in R&D, which is 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%.

Platforms drive economic value across the economy: As has been publicly reported, the development of the Android app ecosystem supports €11.7 billion in revenue for European developers. Google Maps is saving Europeans over 1,180 million hours a year, and it provides

free listings for businesses, who benefit from consumers searching for local goods and services. And YouTube enables artists to reach new audiences and helps small businesses to scale. European consumers and SMEs benefit from digital platforms and other service providers entering new markets and developing innovative products.

Measures to promote market entry and expansion by smaller providers should be supported. However, it is also important, we think, to assess how market entry by large digital platforms has increased - and could continue to increase - choice and competition. Large online platforms compete for user attention across a wide range of user services, either by selling goods or showing adverts. And market entry by larger platforms does not automatically exclude competition from smaller players: Google, Apple, Amazon, Microsoft, Facebook, and many others have all announced major AI initiatives, but AI and machine learning startups continue to attract investment from VCs, with 137 deals worth over $1.4 billion closed in Q2 2019. If large digital platforms had confined themselves to their initial, core service many innovative and valuable products would never have been produced. As the evidence is being collected in this consultation, it will be important to gain a complete picture of what changes could mean for innovation in the round. The hunt for opportunities for entry by new players should not obscure an assessment of what the costs of those new opportunities might be for the wider economy, and ultimately, consumers.

Certain issues (e.g., vertical integration) may involve complex trade-offs which (enhanced) antitrust powers may be best suited to evaluate. 'Vertical integration' often results in product improvements that benefit consumers and 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 rivals. While pre-existing self-preferencing competition cases provide a framework for evaluating whether a particular practice harms or benefits consumers, it may be difficult to weigh up the complex welfare trade-offs of a company's product integrations under broad, ex ante regulatory rules. If antitrust is found to be the tool best suited to the task, agencies should ensure its effectiveness through additional and detailed guidance, greater use of interim measures, and appropriate remedies.

Some may cite *Shopping* as a justification for bans, or presumptions of illegality, when it comes to integrations on a platform. When announcing that decision, the Commission said "*Today's Decision is a precedent which establishes the framework for the assessment of the legality of this type of conduct. At the same time, it does not replace the need for a case-specific analysis to account for the specific characteristics of each market.*" We think the Commission's consultation should consider how new rules could accommodate that case-specific analysis, since it may be necessary to differentiate good and bad acts. For example, when we integrated a thumbnail map on our general results pages in 2008, the UK High Court held that this was "procompetitive" and an "indisputable" product improvement. It may also be relevant to consider how a decision like *Shopping* itself has had, in practice, an "ex

ante effect" for Google as we've thought about the "framework for the assessment of legality" that it creates.

The scope of application of new regulatory obligations and the nature of procedural safeguards for those affected are interdependent questions. A consistent set of rules will ensure uniform protection for European consumers and customers, avoid distorting competition, and be simpler to administer and enforce. Proposals to apply certain rules only to a subset of platforms will need to be carefully weighed against the benefits of consistent regulation with all market participants on a given market being subject to the same regulatory framework. It will be important to have a clear set of defining attributes that are able to accommodate new forms of digital entry (and exit). Insofar as a subset of firms are subject to new rules, enforcement powers that regulatory agencies have should be accompanied by appropriate safeguards to ensure respect for due process, rights of defence, property rights, and evidence-based decisions and avoid hampering innovation.

3. Aspects regarding an Ex Ante Regulatory Instrument

For several of the contemplated interventions, the benefits to platform users would be maximized by ensuring a consistent application across all players in the sector. For example, data portability regimes facilitate switching, multi-homing and innovation when the maximum number of platforms take part. Likewise, customers have an interest in transparency, regardless of the size or market position of the particular platform (*see e.g.*, Guardian Media Group's litigation against Blue Rubicon about hidden fees, and ranking-related concerns raised by restaurants that are listed on Yelp).

Some regulations in the digital sector, such as the Platform-to-Business Regulation, apply to online intermediation services. Proposals to apply particular rules only to certain 'gatekeeper' platforms should therefore be considered cautiously and need to take account of the following considerations: (i) Can a subset of 'gatekeeper' platforms be defined in a clear and certain way, or would it result in lengthy, complex litigation about which platforms are in-scope or out-of-scope? (ii) How can you future-proof rules aimed at catching the 'gatekeeper' platforms of today to ensure they are flexible enough to also catch the 'gatekeeper' platforms of tomorrow? (iii) Would the contemplated rules address problems that *only* arise on larger 'gatekeeper' platforms, or do customers of smaller platforms experience these problems too? (iv) Could the perceived market power of digital platforms be *strengthened* by uneven regulation if customers prefer dealing with "regulated" entities rather than smaller, "unregulated" platforms?

Beyond these threshold questions, the Inception Impact Assessment and consultation document raise several possible issues to be addressed through ex ante regulation.

Self-preferencing. Self-preferencing can be pro- or anti-competitive, depending on the circumstances. There is a recognised risk that self-preferencing can unfairly advantage companies' own services at the expense of rivals.

At the same time, certain practices that could be described as 'self-preferencing' have led to product improvements. As mentioned above, in *Streetmap,* for example, the High Court of England & Wales found Google's practice of showing a Google Maps thumbnail at the top of search results pages to be 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. Accordingly, the Commission has resisted introducing a blanket ban on self-preferencing, instead emphasizing the need for "*case-specific analysis*". Google shares this view. 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.

Measures aimed at addressing self-preferencing will need to distinguish between pro-competitive, and hence permitted, product enhancements and anti-competitive self-preferencing. This assessment necessarily differs from one case to the next. For example, in thinking about design changes such as showing specialised grouped results at the top of a search results page, the assessment could involve the following questions: (i) Does the new product design integration confer an undeserved advantage? (ii) Does the design increase the relevance of search results by providing more relevant information? (iii) Does the design benefit third parties by directing traffic to their sites? (iv) Does the design improve quality and benefit consumers (and has the platform carried out testing to prove that this is the case)? (v) Does the design allow users to choose rival services (*e.g.*, through a choice carousel)? (vi) What is the competitive significance of the design?

Antitrust proceedings, detailed guidance, and targeted rules on specific manifestations of self-preferencing may be better suited to answer these questions than broad regulatory prohibitions.

Interoperability and data portability. Competition between digital platforms is enhanced by measures that let users switch and multi-home without losing access to their data. There is a legitimate concern that people should be able to move between platforms without their data being locked into a particular ecosystem. For example, if a user wants to try out Deezer alongside Google Play Music, they may want to be able to port a list of their 'favourite' songs on Google Play Music rather than having to recompile that list on Deezer. But interoperability brings risks to innovation if implemented crudely. Requirements to build products to the 'lowest common denominator' would ensure that services can work together, but it would prevent the kind of product innovation and choice that comes from having multiple providers offering differentiated services or features. Therefore, the question is not *whether*

multi-homing should be facilitated, but *how* to achieve the benefits of interoperability without sacrificing product quality.

Google has been a long supporter of open source and open ecosystems. However, it is important to ensure that standards are based on quality, so that users benefit from higher quality services. Strict open standards could leave consumers with lower-quality, more basic products online. Digital services are not generally commoditized and homogenous, such that they can be made readily interoperable. Rather, they are characterised by a diversity in features, tools, and interfaces. Even a service as straightforward as sending a written message has produced a wide range of tools with differentiated features, such as WhatsApp, Facebook Messenger, Snapchat, Duo, Telegram, iMessage and others.

Instead, switching, multi-homing, and data mobility could come from faster and more systematic data portability systems. Google has played a leading role in the Data Transfer Project, together with Facebook, Microsoft, Twitter, and various other digital service providers (including Apple, which joined the project on 30 July 2019) to develop a system of data mobility building on a long history of supporting data portability, including Google Takeout launched in 2011. By helping people seamlessly transfer their data between different cloud storage, social media, and other services, this project aims to enhance switching, multi-homing, and choice without 'leveling down' the quality and diversity of services. Industry and regulators could collaborate on a similar systematic data mobility regime, using the framework that the Data Transfer Project has put in place. This approach would benefit consumers, businesses, and the wider economy.

As the consultation progresses, it will be important to consider: (i) which types of services are characterised by difficulties of multi-homing; (ii) whether services in this sector have differentiated features; (iii) whether concrete standards would restrict product differentiation; and (iv) whether there is scope to achieve the same end result -- ease of multi-homing -- through other means, such as data portability.

Transparency. Transparency in platforms' relations with businesses should be encouraged. Understanding how and why platforms make changes to the way results are ranked, for example, helps to dispel misunderstandings and enable platform users to plan their business activities with greater certainty. Google is committed to being transparent. We provide information on how our search engine works and we have also launched a website on how YouTube works. At the same time, transparency can jeopardize innovation if it results in companies having to give up protection of their intellectual property and trade secrets including proprietary tools and algorithms that they may have spent years developing and researching. In other words, a considered policy on the transparent operation of platforms should seek to provide certainty to business users without jeopardizing the proprietary technologies on which those platforms are based. Revealing algorithmic formulas would also make it easier for rogue actors to try and game the system which could result in, for example, more spammy results or more counterfeit products and malicious apps being available online. Moreover, it could also make it more difficult to find the content of those actors who play by

the rules if rogue actors are able to gain more prominence through gaming the system. Such concerns are not new - for example, the Platform-To-Business Regulation provides that platforms shall not be required to provide details of rankings where this would reveal trade secrets but also facilitates the manipulation of results or the deception of consumers by rogue actors involved in fraud, impersonation, spam, counterfeit, deception of users, etc.

An appropriate middle path can be found that encourages trust without sacrificing innovation. For example, the Platform-To-Business Regulation enables platform users to understand the main criteria against which their services are ranked while avoiding obligations to disclose detailed, proprietary information that would discourage investment in search or ranking algorithms. In considering whether further transparency requirements are needed, the Consultation could seek to identify specific examples of where platform users claim to lack transparency, and consider what interventions could be made while preserving platforms' incentives to innovate and invest.

Access to data. A wide range of available data can often help stimulate research, improve understanding of markets, and help guide governmental decisions on matters ranging from economic policy to public health. At the same time, data sharing needs to guarantee user privacy: A paper by one of the authors of the EC Special Advisers' Report shows that anonymised data can often be re-identified, meaning that sharing user-level query and click data could expose their search habits to third parties who receive that data. A previous example concerned New York Times journalists who were able to re-identify 'Searcher No. 4417749' from anonymised AOL search logs.

Taken too far, data access could also enable rivals to reverse-engineer platforms' proprietary algorithms, thereby enabling free-riding and chilling incentives to innovate. It could also undermine incentives to invest in large-scale data collection in the first place, with a consequential loss of new, consumer-facing products that depend on that data. In 2012, for example, Google announced that its Street View cars had driven more than 5 million miles and gathered over 21 million gigabytes of imagery. Since then, Google has worked continuously to improve its mapping services -- adding real-time traffic information and extending Street View to off-road environments. Google makes much of this data available for free, where possible, but would have had fewer incentives to gather this data in the first place if required to share it with rivals who did not make the same investments. Data is non-rivalrous, in other terms it is available to others unlike other raw materials or inputs required in traditional industries. Actual or potential competitors have the ability to gather the same data if they invest time and resources. In some instances, the initial investment is not significant.

In thinking about possible data access measures, relevant considerations therefore include: (i) the likelihood that sharing a particular dataset will jeopardise user privacy; (ii) whether the data -- if shared -- would enable recipients to free-ride on rivals' innovations and proprietary algorithms, thereby undermining innovation; and (iii) whether the party holding a particular dataset has invested resources to gather it. A potentially promising option is to focus on sharing aggregated datasets, which can have wide-ranging uses and applications, but which

avoid the downsides of jeopardizing privacy and innovation. For example, Google makes large-scale search datasets available to rivals for free through the Google Trends and Natural Questions tools, along with multiple other free and open source datasets.

4. Aspects regarding a 'New Competition Tool'

The Commission proposes four options for the design of the NCT, in short: a dominance-based competition tool or a generally applicable market-structure based competition tool; either of which could apply horizontally (i.e. to all sectors of the economy) or on a limited basis to specific industries. 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. Likewise, there is 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 tool could provide the Commission with sufficient flexibility to address structural and other competition-related issues.

The IIA adopts a broad definition of structural competition problems. During the consultation, it will be important, we think, to identify the factors in favour of deploying the NCT in a particular situation. In the IIA, the Commission describes the role of the NCT as being to address certain structural competition problems that existing competition rules cannot address. 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 consultation might 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.

The legal test and evidentiary standard. The Commission describes the NCT as potentially being capable of addressing structural competition problems on both an ex post or ex ante basis (to address a structural lack of, or structural risks to, competition). An appropriately designed NCT could be a useful tool to address such concerns. The following considerations may be relevant:

(1) The legal test. If the Commission proposes that the NCT could be used to impose, rather than recommend, remedies, this would be a significant intervention and the Commission should consider what the relevant legal threshold would be, both for starting an investigation using the NCT and for imposing remedies, so as to permit effective judicial review. For example, when it comes to the imposition of remedies, 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.

(2) The evidentiary standard. As with the legal test, the consultation could be used to examine how to tailor the evidentiary standard to the nature of the concerns the NCT is seeking to address, again, both for starting an investigation using the NCT and for imposing remedies. For example, given that one of the uses it proposes for the NCT is to address structural competition problems on an ex ante basis, the existing jurisprudence of the European Courts regarding the approach to such assessments in the merger control context (e.g. the Court of Justice in *Tetra Laval* or the General Court in *CK Telecoms*) may be relevant when deciding whether to impose remedies.

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

Remedy design. The Commission has suggested that the NCT could be used to intervene at a potentially early stage in dynamic markets. Against that, a key consideration will likely be how to design a remedy framework which can effectively address structural competition problems whilst also preserving existing market dynamics that do not contribute to those problems. Other regimes, such as the UK market investigation regime, may provide useful guidance. For example, the UK regime has in certain cases led to remedies designed to heighten competition by removing certain impediments to competition, without intrusive changes to the existing market structure (such as remedies to encourage consumer engagement, switching and new entry, e.g., in retail banking and energy). The NCT could allow flexibility with remedies ranging from recommendations to proposed legislation to imposition of more specific behavioural or even, in exceptional circumstances, structural remedies. The standards for the imposition of different types of remedies could differ with

higher standards required for the stricter remedies. Given that the Commission envisages deploying the NCT in dynamic markets, it may also want to consider how it would readily permit revision or revocation of a remedy where, for example, justified by market developments.

The Commission may also want to take into account when considering how to make the regime flexible and proportionate is allowing companies voluntarily to propose remedies, 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).

Procedural safeguards. 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. In designing the regime, the Commission may wish to consider the following:

(1) whether to provide for statutory deadlines, defined review phases, and informal reviews and information gathering prior to a formal investigation;

(2) the extent to which affected undertakings would be given access to file and the right to be heard , as well as the extent to which procedural rights would vary between undertakings to whom remedies may apply and other undertakings active in the relevant market(s); and

(3) 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.

5. Conclusion

The Inception Impact Assessments and consultation documents identify a range of policy measures that aim to address concerns about the operation of digital markets and the Commission's ability to intervene.

With this preliminary response, we have outlined what appears to us the main challenge: addressing regulatory concerns, while preserving innovation and ensuring a positive outcome for European SMEs and consumers. It is premature to draw hard conclusions, with the consultation process having only recently begun. But through a range of measures -- pro-competitive regulation, enhanced antitrust enforcement, and a new competition tool -- a solution that meets this challenge is possible.

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We once again thank the Commission for the opportunity to submit feedback to the Inception Impact Assessment on the Digital Services Act package concerning the possible ex ante regulation of platforms and the new competition tool. We look forward to expanding on these ideas in our submission to the Commission's open public consultation on the Digital Services Act package.