

Questionnaire for the public consultation on a New Competition Tool

Fields marked with * are mandatory.

Introduction

Objectives of the public consultation

The proposal for a New Competition Tool is one of the measures aimed at making sure that competition policy and rules are fit for the modern economy. It is meant to address gaps in the current EU competition rules, which have been identified based on the Commission's enforcement experience in digital and other markets, as well as the worldwide reflection process about the need for changes to the current competition law framework to allow for enforcement action preserving the competitiveness of markets.

EU competition law can address (i) anti-competitive agreements and concerted practices between companies pursuant to Article 101 of the Treaty on the Functioning of the European Union ("the EU Treaty") and (ii) the abuse by a company of its dominant position pursuant to Article 102 of the EU Treaty. The enforcement experience of the Commission and national competition authorities, as well as the worldwide reflection process on the fitness of the existing competition rules to tackle today's challenges have helped to identify certain structural competition problems that these rules cannot tackle (e.g. monopolisation strategies by non-dominant companies with market power) or cannot address in the most effective manner (e.g. strategies by companies with market power to extend their market position into multiple related markets).

The objective of this consultation is to collect stakeholder views on two aspects. First, stakeholders are asked to provide their views on whether there is a need for a new competition tool to ensure fair and competitive markets with a view to delivering lower prices and higher quality, as well as more choice and innovation to European consumers. Second, stakeholders are asked to provide their views on the characteristics that such a new competition tool should have in order to address structural competition problems in a timely and effective manner.

In parallel, the Commission is also engaged in a process of exploring, in the context of the Digital Services Act package, 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. As part of that process, the Commission has launched a consultation to seek views on the framing, on the scope, the specific perceived problems, and the implications, definition and parameters for addressing possible issues deriving from the economic power of large, digital gatekeeper platforms. As such, the work on a proposed New Competition Tool and on the ex ante rules complement each other. The work on the two impact assessments will be conducted in parallel in order to ensure a coherent outcome. In

this context, the Commission will take into consideration the feedback received from both consultations. We would therefore invite you, in preparing your responses to the questions below, to also consider your response to the parallel consultation on ex ante rules for large, digital gatekeeper platforms, which can be found at [Digital Services Act survey](#).

About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- Gaelic
- German
- Greek
- Hungarian
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association

- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Stefano

* Surname

MARMO

* Email (this won't be published)

stefano.marmo@amchameu.eu

* Organisation name

255 character(s) maximum

American Chamber of Commerce to the European Union (AmCham EU)

* Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

* Web address

http://amchameu.eu/

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

* Country of origin

Please add your country of origin, or that of your organisation.

- | | | | |
|---|--|--|--|
| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |
| <input type="radio"/> Andorra | <input type="radio"/> El Salvador | <input type="radio"/> Madagascar | <input type="radio"/> São Tomé and Príncipe |
| <input type="radio"/> Angola | <input type="radio"/> Equatorial Guinea | <input type="radio"/> Malawi | <input type="radio"/> Saudi Arabia |
| <input type="radio"/> Anguilla | <input type="radio"/> Eritrea | <input type="radio"/> Malaysia | <input type="radio"/> Senegal |
| <input type="radio"/> Antarctica | <input type="radio"/> Estonia | <input type="radio"/> Maldives | <input type="radio"/> Serbia |
| <input type="radio"/> Antigua and Barbuda | <input type="radio"/> Eswatini | <input type="radio"/> Mali | <input type="radio"/> Seychelles |
| <input type="radio"/> Argentina | <input type="radio"/> Ethiopia | <input type="radio"/> Malta | <input type="radio"/> Sierra Leone |
| <input type="radio"/> Armenia | <input type="radio"/> Falkland Islands | <input type="radio"/> Marshall Islands | <input type="radio"/> Singapore |
| <input type="radio"/> Aruba | <input type="radio"/> Faroe Islands | <input type="radio"/> Martinique | <input type="radio"/> Sint Maarten |
| <input type="radio"/> Australia | <input type="radio"/> Fiji | <input type="radio"/> Mauritania | <input type="radio"/> Slovakia |
| <input type="radio"/> Austria | <input type="radio"/> Finland | <input type="radio"/> Mauritius | <input type="radio"/> Slovenia |
| <input type="radio"/> Azerbaijan | <input type="radio"/> France | <input type="radio"/> Mayotte | <input type="radio"/> Solomon Islands |
| <input type="radio"/> Bahamas | <input type="radio"/> French Guiana | <input type="radio"/> Mexico | <input type="radio"/> Somalia |
| <input type="radio"/> Bahrain | <input type="radio"/> French Polynesia | <input type="radio"/> Micronesia | <input type="radio"/> South Africa |

- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago

- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen

- Czechia
- Lebanon
- Saint Helena
Ascension and
Tristan da
Cunha
- Zambia
- Democratic
Republic of the
Congo
- Lesotho
- Saint Kitts and
Nevis
- Zimbabwe
- Denmark
- Liberia
- Saint Lucia

* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

Anonymous

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

Public

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

I agree with the [personal data protection provisions](#)

A. How to answer?

You are invited to reply to this public consultation **by 8 September 2020** by filling out the eSurvey questionnaire online. The questionnaire consists of four main sections:

1. General information on the respondent
2. Structural competition problems: this section aims to gather the experience and views of stakeholders on scenarios resulting in a structural lack of competition and structural risks for competition, as well as about whether the current EU competition rules can deal with them.
3. Assessment of policy options: this section aims to gather the views of stakeholders on the four policy options outlined in the Inception Impact Assessment.
4. Institutional set-up of a new competition tool: the section aims to gather the views of stakeholders about how the new competition tool should be shaped in order to address structural competition problems in a timely and effective manner.

The Commission will summarise the **results in a report**, which will be made publicly available on the Commission's [Better Regulation Portal](#).

In the interest of time, the questionnaire is available in English only during the first two weeks. Thereafter the questionnaire will also be available in all official EU languages. You may respond to the questionnaire in any official EU language.

To facilitate the analysis of your reply, we would kindly ask you to **keep your answers concise** and to the point. You may include documents and URLs for relevant online content in your replies. **You are not required to answer every question.** You may respond 'not applicable/no relevant experience or knowledge' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to allow the Commission to gather solid evidence on the different aspects covered by this questionnaire.

You are invited to read **the privacy statement attached** to this consultation for information on how your personal data and contribution will be dealt with.

You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this you have to click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.

Whenever there is a text field for a short description, you may answer in **maximum 3000 characters**.

Questions marked with an asterisk (*) are **mandatory**.

Digital markets in this questionnaire refer to markets largely relying on digital technologies with certain specific characteristics, such as extreme economies of scale and scope, strong network effects, zero pricing and data dependency.

No statements, definitions, or questions in this public consultation may be interpreted as an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

In case you have questions, you can contact us via the following functional mailbox: COMP-NEW-COMPETITION-TOOL@EC.EUROPA.EU;

If you encounter technical problems, please contact the Commission's [CENTRAL HELPDESK](#).

*** 1. Please indicate your role for the purpose of this consultation.**

- An individual citizen
- An association or trade organisation representing consumers
- An association or trade organisation representing businesses
- An association or trade organisation representing civil society
- A business / economic operator of small size
- A business / economic operator of medium size
- A business / economic operator of large size
- A public authority
- A research institution / Think tank

- Academia (Legal field)
- Academia (Economics)
- Academia (Engineering)
- Academia (Other)
- Law firm / consultancy
- Other: Optional

*** 2. Only for businesses / economic operators: Please identify the markets /sectors in which you provide your services.**

- A - Agriculture, forestry and fishing
- B - Mining and quarrying
- C - Manufacturing
- D - Electricity, gas, steam and air conditioning supply
- E - Water supply; sewerage; waste management and remediation activities
- F - Construction
- G - Wholesale and retail trade; repair of motor vehicles and motorcycles
- H - Transporting and storage
- I - Accommodation and food service activities
- J - Information and communication
- K - Financial and insurance activities
- L - Real estate activities
- M - Professional, scientific and technical activities
- N - Administrative and support service activities
- O - Public administration and defence; compulsory social security
- P - Education
- Q - Human health and social work activities
- R - Arts, entertainment and recreation
- S - Other services
- T - I am not a business/economic operator
- Other

*** 3. Please briefly explain your activities/describe your organisation/company and - if applicable - the main goods/services you provide.**

3000 character(s) maximum

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating a better understanding of EU and US positions on business matters.

*** 4. Only for businesses / economic operators: Does your company provide digital goods or services?**

- I am not a business operator/representative of businesses
- No
- Not applicable
- Yes, I am active as an e-commerce marketplace
- Yes, I operate an app store
- Yes, I develop and provide apps
- Yes, I provide a search engine
- Yes I provide an operating system
- Yes I provide a social network
- Yes, I provide network and/or data infrastructure/cloud services
- Yes, I provide digital identity services
- Other

5. Only for business / economic operators: As a business user, do you rely on digital services or on digital operators and/or online platforms? (For the purposes of this questionnaire 'online platform' refers to a firm operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.)

- Yes, my business is fully dependent on digital operators and/or online platforms
- Yes, my business is largely dependent on digital operators and/or online platforms
- Yes, my business is somewhat dependent on digital operators and/or online platforms
- No
- Not applicable / no relevant experience or knowledge
- I am not a business operator/representative of businesses

5.1. If yes, please describe those digital services you use. If no, please explain why you do not use digital services, and whether you expect/plan to rely on them in the next five years.

3000 character(s) maximum

We have a very diversified membership which relies on a slew of digital services as they are active across the board.

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)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
B - High degree of vertical integration ('Vertical integration' relates to scenarios where the same company owns activities at upstream and downstream levels of the supply chain)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
C - High start-up costs (i.e. non-recurring costs associated with setting up a business)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
E - Regulatory barriers ('Regulatory barriers' refer to regulatory rules that make market entry or expansion more cumbersome or extensively expensive)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
F - Importance of patents or copyrights that may prevent entry	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
I - Lack of access to a given input/asset which is necessary to compete on the market (e.g. access to data)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
M - Customers typically use one platform (i.e. they predominantly single-home) and cannot easily switch	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
O - Significant financial strength	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Q - Data dependency ('Data dependency' refers to scenarios where the operation of companies are largely based on big datasets)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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.)



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.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Highly concentrated markets where only one or few players are present, which allows to align their market behaviour.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* The widespread use of algorithmic pricing that allows easily to align prices.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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 markets in the long term.)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

5000 character(s) maximum

Generally, monopolisation is problematic only if acquired by unfair practices, i.e., other means than competition and innovation. Given the special responsibility applied to these companies, the notion of dominance should not be extended to somewhat vague concepts of important market power. Doing otherwise would significantly jeopardize legal certainty and market intervention may lead to undesired effects. As explained earlier, highly concentrated markets are not a problem per se. If the market is characterised by regular/constant innovation, high quality products, and heterogenous products, the chances for competitors to align their market behaviour are pretty low, even when there are not many competitors around. A gatekeeper scenario is not per se a structural competition problem, it is problematic where a company is dominant and abuses its market power to exclude competitors, for example by locking-in customers who can no longer go to a competitor. Articles 101 and 102 TFEU provide for the sufficient legal basis to catch any of these scenarios. Tipping markets are usually very prone to innovation with fast rises and equally fast falls. As a result, these should not be treated as structural competition concerns.

*** 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 market situation?**

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

*** 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

The European Commission should not have the power to intervene in cases where there is no dominance.

*** 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

*** 9.3 Please explain your answer.**

3000 character(s) maximum

In principle, Article 101 and 102 provide for the necessary legal basis to deal with most situations.

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

Anti-competitive monopolisation strategies cut across all sectors and markets and are not specific to the digital sector.

*** 10.3. Please provide examples and explain them.**

3000 character(s) maximum

Please see our response above.

*** 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

Anti-competitive monopolisation strategies cut across all sectors and markets. They are not specific to the digital sector.

*** 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

By definition, monopolisation achieved through anti-competitive means raises concerns – this is however not a new theory of harm but the very essence of Articles 101 and 102 TFEU.

*** 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

The Commission may need to intervene before a company reaches the status of “monopoly” because of their essential function for competition. However, in such a case, the Commission should bear the burden of proof of demonstrating such monopolisation, the monopolising status must be rebuttable, and operators should be in a position to have this reviewed any time by means of a submission of their own initiative, as market conditions evolve.

*** 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

*** 11.3. Please explain your answer.**

3000 character(s) maximum

Articles 101 and 102 TFEU are suitable and sufficiently effective to address anti-competitive monopolisation.

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

Oligopolies are present in a variety of markets and sectors. However, as in non-digital markets, where vertical integration (of essential infrastructure) companies created similar harm, these can be addressed sufficiently by Articles 101 and 102 TFEU.

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

*** Please explain your answer and your rating above.**

3000 character(s) maximum

Not all oligopolies constitute a competition problem. Only certain oligopolies may lead to tacit collusion and this only if the market presents certain features, as those described in the Table in 12.3.

*** 12.4. Can you think of any other features of an oligopolistic market with a high /substantial risk of tacit collusion?**

- Yes
- No

*** 12.5. Please indicate which are these other features of an oligopolistic market with a high/substantial risk of tacit collusion and rate them according to their importance from 0 to 4 (0 = no knowledge/no experience; 1 = no importance /no relevance; 2 = somewhat important; 3 = important; 4 = very important).**

3000 character(s) maximum

There are a number of market features entailing a tacit collusion risk, which are not captured in table 12.3 above. These are: lack of innovation; non-technically complex products, low quality products; stagnant, non-developing markets; financially weak buyers; buyers unfamiliar with the products' technicalities.

*** 12.6. In your experience, what are the main competition concerns that arise in oligopolistic markets prone to tacit collusion?**

3000 character(s) maximum

Output restrictions, restriction of innovation and price increases.

*** 12.7. Do you consider that oligopolistic market structures are common in digital sectors/markets?**

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

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

3000 character(s) maximum

Oligopolies are noticeable in a multitude of markets, also in digital markets, even if to a lesser extent. Even if oligopolistic, the majority of digital markets are driven by innovation, offer technically complex products which are typically not homogenous

*

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

The Commission should only intervene to the extent that the behaviour in question raises a competition issue under Articles 101 and 102 TFEU.

*** 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

*** 13.3. Please explain your answer.**

3000 character(s) maximum

Article 102 TFEU already allows to sufficiently address oligopolistic situations.

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.

*** 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

Article 101 TFEU is sufficient to address markets with pricing algorithms, as in traditional cases of collusion.

*** 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

*** 15.3. Please explain your answer.**

3000 character(s) maximum

Articles 101 and 102 TFEU are perfectly suitable to deal with all competition issues arising in this context. The Commission could deal with this in the same way as in traditional cases of collusion, treating new techniques simply as a new means of collusion between operators (see Ethuras case).

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

Tipping markets are prevalent in a wide variety of markets and sectors with strong network effects.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* Indirect network effects	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Economies of scale	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Users predominantly single-home (i.e. they use typically one platform only)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

*** 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

Direct network effect are essential in a tipping market. If coupled with single home customers this may create an additional lock-in effect.

Economies of scale are also of the essence for tipping markets, as the number of customers and the fact of achieving a critical threshold of customers is key. A competitor would need a significant number of customers to make its average costs fall below the market. Without such critical amount there are no profits and thus the competitor may be obliged to leave the market.

However, there are many scenarios, where digital markets appear to have tipped but later they are disrupted by a novel business model. In the digital economy, competition can be non-linear and based on (very often radical) innovation

*** 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

Certain types of digital business models and technologies operate on the basis of large amounts of users for their technology/product to be successful. However, other digital markets are not more prone to tipping than non-digital markets where penetration is also a factor of success.

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	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* There will not be sufficient competition on the market in the long run	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

* Customers will not have enough choice	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Customers may face insufficient innovation	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Customers may face higher prices	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

*** 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

All of the above competition concerns are risks linked to dominant firms who abuse their position. Existing competition law can tackle that and tools like interim measures can also help prevent further monopolisation through early intervention.
Markets can be disrupted by changing consumer attitudes, new entrants and new technology. Intervening prematurely under the assumption of tipping could lead to distortion of competition.

*** 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

Tipping is a relative concept and premature intervention may damage technological innovation and progress.

*** 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

*** 17.3. Please explain your answer.**

3000 character(s) maximum

Articles 101 and 102 TFEU are able to address effectively gatekeeper scenarios. Additionally, the Commission can already use interim measures against an undertaking if there is a risk that it uses anticompetitive means to tip the market.

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

Not applicable.

*** 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

Certain key technologies, key datasets, and key digital infrastructures can play a role in helping certain operators with a gatekeeper status. This status can however be lost again over time and is in flux as markets evolve, just as in non-digital markets.

*** 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

A gatekeeper scenario can also occur in non-digital markets. This would be the case, for example, of a paper magazine given for free to users and making profits through advertising.

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	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Customers cannot easily switch (lack of multi-homing)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

*** 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

The lack of multi-homing can be a very important factor as it can prevent others from entering the market thus leaving all control to one single entity. This should be assessed on a case by case basis in combination with other factors, including the competitive pressures on all sides of multi-sided markets.

The fact that business users need to accept the conditions of the gatekeeper is not relevant given that 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. Standard terms and conditions are widespread in the economy, with companies of all sizes, digital or not. They create efficiencies, enable scale, consistency of services, and help ensure users are treated equally. The use of standard terms and conditions is what makes it possible to successfully host users. A model based on individually negotiated terms would massively increase transaction costs and cause substantial delays on onboarding new users. This could only be a competition concern if these conditions are unfair.

**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	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* As customers/users cannot easily switch, they have to accept the competitive environment on the aftermarket/platform	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Business operators can only reach the customers that use the specific platform /aftermarket by adapting their business model and accepting their terms and conditions	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

- * 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

See 18.8

- * 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

The Commission should be able to intervene against abuses of their dominant position by gatekeepers i.e. where a gatekeeper infringes Article 102 TFEU. The mere achievement of a gatekeeping position is not as such an infringement of competition, just like holding a dominant position is not a problem. Companies should not be prevented by the Commission from becoming successful.

- * 19.2. Do you consider that Articles 101 and 102 of the EU Treaty are suitable and sufficiently effective instruments to intervene in markets characterised by ‘gatekeeper platforms’ in order to preserve/improve competition?**

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

- * 19.3. Please explain your answer.**

3000 character(s) maximum

As explained in question response to question 18.2, Articles 101 and 102 TFEU are sufficient to address competition concerns that may arise from a gatekeeper situation. Articles 101 and 102 TFEU have been applied by the Commission and interpreted by the EU Courts in a way that can address any behaviour that may raise antitrust concerns, including behaviour related to those raised by so-called gatekeepers. The Commission should not depart from well-defined concepts of dominance, as it is likely to lead to significant uncertainty.

- * 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

*** 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

Article 101 TFEU is sufficient to address any collusive behaviours that would result from structural competition problems. The scope is already broad enough to cover pricing algorithms, as in traditional cases of collusion.

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

3000 character(s) maximum

See response to Q. 20.1

*** 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

Article 102 TFEU is sufficient to address potential competition concerns.

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

3000 character(s) maximum

See Answer to Q. 20.1

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

See our response to Question 25.1

*** 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

AmCham EU appreciates the efforts of the Commission in reviewing the effectiveness of the current competition rules, including the adequacy of Articles 101 and 102 TFEU. These reviews based on new facts and insights are important to ensure that competition remains buoyant and its enforcement not only effective, but also timely and proportionate.

The Commission has highlighted that it is focusing on network effects, economies of scale, multi-homing and lock-in effects which can potentially distort competition and we agree that the prevention of the distortion of competition should indeed remain a key objective for regulators.

However, AmCham EU believes that the Commission is well equipped and already has the necessary legal tools to address any potential competition concerns. Therefore, there is no need to introduce a new competition tool as currently proposed. This notwithstanding, should the Commission decide to implement a new competition tool (NCT), we would recommend the following guiding principles:

1. Any NCT should have a very limited scope of application. It should be noted in this respect that any open-ended NCT, which would vest the European Commission with new far-reaching powers, is prone to create uncertainty in the market which affects competition. Hence:
 - a. The NCT should clearly specify the types of “structural competition problems” that could trigger its application;
 - b. The NCT should list clearly the set of features that should be present in a sector/market to make it the subject of an investigation under the NCT; and
 - c. The NCT should apply to the above-mentioned “structural competition problems” in the above-mentioned sectors/markets, only where there is a clear gap in the existing EU enforcing toolbox (i.e. only where the existing tools are unable to address properly the identified problem).

2. The “structural competition problems”, which are the focus of the proposed NCT, cannot be any kind of “structural competition problem”. The NCT can only be used for new “structural competition problems”. The NCT must not be used to address “traditional” competition problems (structural or otherwise), as these problems (structural or otherwise) have so far been (satisfactorily) addressed with the existing legal toolbox.

*** 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

See our response to Question 25.1

*** 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

*** 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

*** 28.2. 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

Coordination with sector-specific legislation is key, so as to ensure legal certainty.

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)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* • Inform and make recommendations/proposals to sectorial regulators	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* • Inform and make legislative recommendations	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
* • Impose remedies on companies to deal with identified and demonstrated structural competition problems	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

*** 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

AmCham is of the view that there should not be a new competition tool. Therefore, the above questions are not applicable. Nevertheless, should the Commission decide to forego AmCham's recommendations on the matter and move forward with its new competition tool, we believe that a continuous and appropriate dialogue is vital. Indeed, AmCham EU regularly facilitates a dialogue in relation to competition policy through its Committee activities (e.g., its Annual Competition Conference), and supports any additional measures that may be necessary to ensure a well-functioning competitive landscape.

As part of this dialogue, we encourage the Commission to ensure that industry players and regulators continue to exchange views and approaches in the context of a clear and proportionate regulatory framework.

AmCham EU is of the view that the Commission should not have the ability to impose remedies on companies where there is no clear infringement of Articles 101 and 102 TFEU. In this respect, AmCham EU reiterates the need for strong and effective competition law enforcement grounded in sound economic analysis, fair and in any event predictable.

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)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* • Structural remedies (for instance, divestitures or granting access to key infrastructure or inputs)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
*			

- Hybrid remedies (containing different types of obligations and bans)



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

3000 character(s) maximum

As explained above, AmCham EU considers that the Commission should not be able to impose remedies where it cannot establish an infringement of Articles 101 or 102 TFEU. Additionally, given that the proposed new competition tool seems to target to a very substantial extent single firm conduct without providing the substantive and procedural safeguards enshrined in Article 102 TFEU, AmCham EU notes that this creates an incentive to bring cases under the NCT instead of Article 102 TFEU and hence, without the appropriate substantive and procedural guarantees. This is a significant risk, and it should be avoided at all cost that any potential NCT is being used to circumvent existing legal substantive and procedural standards.

*** 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

32.1. Please explain your answer.

3000 character(s) maximum

As explained above, AmCham EU considers that the Commission should not be able to impose remedies where it cannot demonstrate an infringement of Articles 101 and 102 TFEU.

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

The Commission already has wide-ranging investigative powers at its disposal to perform its role of enforcing Articles 101 and 102 TFEU, including the power to request information from all undertakings (whether or not they are suspected of infringing the rules) and to carry out investigations at their premises. The Commission also has the power to engage in sector inquiries

*** 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

AmCham is of the view that, if the Commission were to decide to introduce such tool, any effective investigative/redressive competence in respect of competition laws, be it under article 101/102 TFEU or any potential new competition tool, should be enforced within certain limited time frames. Especially in fast-moving industries, it is in the interest of any industry and all its participants and stakeholders that investigations are carried out as quickly as possible to enhance legal and economic certainty. At the same time, it is important however that the Commission take the time to properly consider and understand market dynamics before reaching any conclusion, and allow the time for companies to be heard and provide input at various stages in the procedure.

*** 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

Interim measures should only be used in the context of Article 101 or 102 TFEU proceedings, where there is prima facie evidence of an infringement.

*** 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

If the Commission were to decide to introduce an ex ante competition tool, AmCham takes the view that the key in the success of any such potential tool lies in the quality and transparency of the dialogue between enforcers, industry and respective experts. As indicated above, dialogue and fostering initiatives from within the industry is preferable to any remedy imposed by the Commission or any other regulator.

*** 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

If the Commission were to decide to go ahead with the new competition tool, it is critical that rights of defence and procedural safeguards are incorporated in any new competition procedure. It is important that parties be offered an opportunity to comment on any of the Commission's findings in such procedures before a final decision is issued. Such safeguards are important to ensure that conclusions are based on firm industry knowledge, and that any remedies are proportionate to the true extent of the potential problem under consideration.

*** 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

Given that AmCham EU is of the view that the power to impose remedies should not be granted to the Commission where there is no infringement of Article 101 and 102 TFEU, third parties should not have the opportunity to review them.

*** 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

The EU is founded on the rule of law and there are strong traditions in EU competition law to protect procedural fairness and rights of defence.

EU law is based on the primacy of the rule of law and the respect of fundamental procedural rights. The EU Courts require that EU competition enforcement is equally equipped to protect due process and procedural fairness and rights, including rights of defence, rights to be heard, right to appeal and the general principles of proportionality. These procedural safeguards are of the essence and need to be guaranteed.

The envisaged new competition tool would be highly intrusive given that it could empower the Commission to impose intrusive remedies. Such measures must be subject to strong procedural safeguards that protect rights of defence effectively.

By way of example, the UK markets regime which is similar to the new competition tool that the Commission seems to be considering provides for a number of safeguards. For instance, at the end of "Phase I", the CMA is required to consult on its decision to refer a "market(s)" for in-depth investigation and to specify which "features" it intends to investigate. The subsequent referral decision can be appealed to the UK Competition Appeal Tribunal (under a judicial review standard) and thereafter to the UK Court of Appeal. These consultation and appeal rights provide an important guarantee of companies' rights of defense. The decision to impose remedies at the end of a market investigation is also subject to judicial review. The phase II decision itself is made by a panel of independent CMA members retained for that purpose rather than by the CMA hierarchy. There are several examples of successful appeals that have resulted in a decision being quashed (in whole or part) and/or remitted to the CMA for reconsideration (e.g., Groceries (2009), Payment protection (2009), Private healthcare (2013)).

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

3000 character(s) maximum

AmCham EU is of the view that any investigation into anti-competitive practices (be it under Article 101 or 102 TFEU, under the EUMR and potentially under the new competition tool), should be executed by regulators, including the Commission, in the most effective, balanced and neutral way. In any potential ex ante enforcement, this is even more the case. AmCham EU is of the opinion that, if the Commission were to decide to introduce such tool, any ex ante Commission investigation under the new competition tool should thus be accompanied by the necessary safeguards.

F. Concluding questions and document upload

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 5. There is a need for combination of two or more of the options 2 to 4.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

- * 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

In view of the fact that AmCham EU is a representative body of many companies active in various industries. It is not well-positioned to respond to this question.

41. Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

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

3000 character(s) maximum

No

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

- Yes
 No

Contact

COMP-NEW-COMPETITION-TOOL@EC.EUROPA.EU

