Microsoft

Microsoft Corporation
Response to the European Commission's
Consultation on a 'New Competition Tool'

(8 September 2020)

A. Introduction and Executive Summary

Microsoft appreciates the opportunity to comment on the European Commission's consultation regarding the development of a new competition tool (NCT).[1]

In summary:

- Microsoft supports the Commission's objective to ensure that its competition policy and rules are fit for the digital age and are capable of levelling the playing field so that business will invest, innovate and grow. The underlying market characteristics and dynamics that accompany digital transformation bring manifold benefits but also create legitimate concerns for which, in certain circumstances, there may be a gap in the current competition policy armory.
- There is wide support for expansion of the competition policy tool kit as an effective way to address these concerns, which reflects the strong reputation which the Commission's competition policy has earned over the years through clear policy objectives, a coherent and internally consistent analytical framework, its technocratic, non-political approach and its robust procedural safeguards.
- Microsoft supports the case for the introduction of the NCT; it is however important that the Commission will preserve the existing benefits of competition policy built up over decades whilst equipping itself to address the legitimate concerns raised in recent years as to the effectiveness of the Commission's powers.
- Microsoft believes that the preferred NCT option should be a market structure-based tool that applies to all sectors (i.e. Option 3):
  - In our view, the dominance-based options are unlikely to cover comprehensively the structural competition problems that the Commission will face, including markets that have not yet tipped but are prone to tipping and oligopolistic markets with an increased risk of tacit collusion.
  - A sector-limited NCT would be less flexible, failing to capture structural competition problems in out-of-scope sectors; furthermore, a sectoral tool would raise the prospect of sterile disputes over 'jurisdiction' rather than to focus on substance. It would also be open to charges of discrimination by prejudging that structural competition problems are likely to exist in certain sectors.
- Microsoft considers that, on balance, the NCT should solely address competition issues to the exclusion of consumer protection considerations. While, admittedly, the line between the two are not always easy to draw, there are strong arguments for a competition-only focus. It would allow the Commission to base the NCT on well-understood policy objectives and avoid more complex trade-offs

[1] European Commission, Public Consultation 3 June 2020 – 8 September 2020, *Single Market – new complementary tool to strengthen competition enforcement,* (see here)

generated by consumer protection considerations. A wider consumer protection policy would risk leading the Commission away from technical issues into a wider political minefield.

- The Commission will also need to make the sensitive decision of whether to address market failures stemming from legislation or regulation at either Member States or EU level. Given the objective of the NCT to address "structural competition problems" in full, Microsoft believes it would be appropriate for the Commission to be able to address concerns regardless of whether they stem from private or public conduct.

- The NCT would be more robust if the Commission were required to identify a plausible remedy at an early stage of the investigation. There are two reasons why such a requirement would be justified: first, the potential benefits to intervention in terms of effectiveness of remedies must be sufficiently concrete and likely to justify the significant costs of a market investigation (particularly in the absence of any deterrent effect); and, second, for the NCT, more than for other competition mechanism, it is the remedy which determines the relevant counterfactual without which a clear competition assessment will not be possible.

- There would be a significant overlap between Option 3 of the NCT and the existing competition tools, in particular Articles 101 and 102. Microsoft believes there should be a priority rule for determining whether it is more appropriate to address the issues with the NCT or the Commission's existing powers. The UK's market investigation regime (which has obvious similarities with Option 3 of the NCT) provides a good basis for such a priority rule, namely that the NCT should only address problems within the scope of its conventional competition tools where (a) it has *'reasonable grounds to suspect'* that there are *'features'* of a market distorting competition but does not have sufficient grounds to establish a breach of its conventional competition tools or (b) action under its conventional competition tools *'is likely to be ineffective.'*[2]

- One of the most difficult issues will be the legal standard for the NCT. In Microsoft's view, the NCT should apply a legal standard for intervention which is consistent with EU competition policy and, in particular, the Commission's existing competition policy instruments. A lowering of standards away from precedent would unjustifiably disregard the Commission's and the EU Courts' decades of experience and accumulated practice on the appropriate treatment of different types of conduct and market features. This calculus does not change materially due to the absence of fines or infringement decisions.[3] The standards set under Article 101 and 102 TFEU focus primarily on the costs and benefits of intervention without consideration for whether a fine will ultimately be imposed.[4]

- Procedural safeguards are a necessary consequence of any creation of novel regulatory powers. Again, inspiration can be drawn from the UK market investigation regime which has an elaborate set of procedural safeguards to ensure due process for these wide-ranging investigations, including (i) a two-phase process, where a Phase I market study may lead to an in-depth (Phase II) market investigation; (ii) a strict legal test for opening a Phase II investigation which is a protection mechanism against "fishing expeditions", i.e. lengthy investigations being launched without a clearly defined theory

2 OFT, *Guidance on Market Investigation References, 2006* (see here, original text has been adopted unamended by the CMA).

3 Amelia Fletcher, *Market Investigations for Digital Platforms: Panacea or Complement?* Centre for Competition Policy University of East Anglia, 6 August 2020.

4 Wouter Wils, *Optimal Antitrust Fines: Theory and Practice,* World Competition Vol 29, No 2, June 2006.

of harm and without plausible remedies in prospect; and (iii) strict timelines, both for the conduct of Phase I and Phase II of its review.

- The final safeguard, and perhaps one of the most important for the legitimacy of the NCT relates to the right of judicial review: the substantive legal tests for the NCT must be sufficiently clear and precise to enable affected companies to challenge the Commission's findings; and the scope and intensity of the review of the EU courts, in terms of merits, should be no less than what is accorded in relation to the existing competition tools.

B. The Case for an Extension of the European Commission's Competition Tool Kit

The proposal to introduce an NCT is part of the Commission's answer to the challenge that competition policy has increasingly fallen short. The claim is made that the competition agencies have been "asleep at the wheel" in recent years but also that the existing competition policy tools lack sufficient scope, flexibility, speed and powers to tackle today's competition problems, particularly in the digital sector. This discussion is part of a far wider debate over the ability of the modern economy to deliver the best outcomes for society.

Microsoft recognises that the underlying market characteristics and dynamics that accompany digital transformation, which bring manifold benefits, at times create legitimate competition concerns which may be best addressed outside the context of traditional competition enforcement. While some of the additional burden of addressing those concerns will fall on *ex ante* regulation, there is strong support by many policy makers and commentators to rely heavily on competition policy and to expand the scope of its existing tool kit.

This support reflects the good reputation which competition policy (both at a global but in particular at the EU level) enjoys, despite its occasional shortcomings. This reputation was forged as a result of its conversion towards clear policy objectives; its coherent and internally consistent substantive analytic framework; and its technocratic, non-political approach which is supported by clear procedural safeguards. The clarity of the competition policy framework, and of the economic theories underpinning it, support a consistent legal framework for enforcement across a variety of different market structures and market characteristics. Furthermore, competition rules have been capable of adapting and changing over time to keep pace with innovation and changes in business practices, as well as preserving political legitimacy.

The introduction of the NCT would mark a policy choice to widen the role of competition policy to address perceived failings and enforcement "gaps" through a hybridized instrument. In so doing, it will inevitably blur the line between competition policy and wider regulatory policy. The Commission would step from enforcing the law to managing a broader regulatory remit. While this does not automatically undermine the existing tenets of EU competition policy, the wider regulatory remit of the NCT – with more complex trade-offs – will inevitably put pressure on them.

Microsoft sees a case for the introduction of the NCT to address the gaps in existing enforcement; the challenge for the Commission will be to make sure that it does not throw out the baby with the bathwater: preserving the benefits of competition policy built up over decades whilst equipping the Commission to address the legitimate concerns raised in recent years as to the effectiveness of Commission's competition powers.

Microsoft believes that this can be achieved if the existing core safeguards of competition policy are preserved and extended to the NCT; namely:

- Substantive safeguards: Firstly, the NCT must be in line with the existing competition policy objectives; second, the NCT must clearly identify the gaps in existing enforcement which it seeks to address and the standard for intervention must be tailored precisely to address those gaps, rather than granting broad discretion to intervene which supplants effective existing enforcement.
- Consistency safeguards: The NCT must not create issues of consistency and conflict with the existing legal framework. In other words, it must be clear precisely when the NCT is applicable and its enforcement should not undermine the existing framework.
- Procedural safeguards: **T**here must be strong procedural safeguards to counterbalance the remedial powers with which the NCT is endowed. This requires safeguards on the rights of defense, as well as safeguards which ensure the efficiency and objectivity of the investigative process.
- Full judicial review: Clear and judiciable legal tests must be designed to allow for a full defense before the European Courts, both in respect of findings of *structural competition problems* and the imposition of remedies.

Microsoft sets out its views on each of these in turn.

C. Substantive Safeguards

Microsoft submits that the NCT needs to be designed to address gaps in existing enforcement with a robust objective standard for intervention rather than a "catch all" policy instrument that would, in effect, supplant the Commission's existing powers. To this end, Microsoft sees two critical substantive safeguards, namely:

(i) a clearly defined scope such that the NCT is sufficiently wide to capture the relevant concerns but also delineate the boundaries of the tool (i.e. what issues the tool is not supposed to capture); and

(ii) early identification of plausible remedies such that the Commission evaluates whether there are suitable remedies to address the potentially harmful market features or conduct.

C.1 The right scope of the NCT

The NCT poses two questions as to its appropriate scope: one explicit (i.e. which of the four policy options set out in the Consultation is the right one) and one implicit (i.e. what are the outer limits of the NCT's scope).

(i) The optimal policy option for the NCT

The four policy options offered by the Commission in the Consultation Process are defined along two dimensions: (i) policy reach: a narrow dominance-based tool versus a wide market-structure tool; and (ii) industry reach: a narrow tool for digital markets versus a wide tool which is universally applicable across all industries.

As outlined in Microsoft's submissions on the inception impact assessment, and for the reasons further detailed below, Microsoft believes that the preferred NCT option should be a market structure-based tool and should apply to all sectors (i.e. Option 3).

Dominance-based tool versus market-structure based tool

Microsoft believes that the dominance-based options are unlikely to cover comprehensively the structural competition problems the NCT is intended to address, including markets that have not yet tipped but are

prone to tipping, oligopolistic markets with an increased risk for tacit collusion, and more generally, competition concerns where an industry wide approach would be appropriate.

Indeed, the dominance-based option itself betrays a conflict underpinning the NCT: is the "problem" the (in)effectiveness of Article 102 TFEU in addressing certain issues or a combination of issues including true regulatory "gaps" where Article 101 and Article 102 do not apply at all?

If, however, the Commission concludes there is an insufficient regulatory gap to justify the introduction of a market structure-based tool, Microsoft believes that reform of Article 102 TFEU would be more appropriate than introduction of a purely dominance-based NCT. This would enhance legal certainty by ensuring that a consistent, single standard for intervention applied to dominant firms while not destabilizing the Commission's existing competition instruments by introducing new powers in parallel.

Sectoral Tool versus Horizontal Tool

Microsoft also supports a horizontal rather than a sectoral approach for the NCT as this would be more flexible to capture the issues it seeks to address, as well as fairer and more defensible under the rule of law.

A sector-limited NCT would be less flexible, failing to capture structural competition problems in out-of-scope sectors. While the market failures particularly associated with digital markets such as strong economies of scale and network effects may be more prevalent in the platform economy, these issues are not novel and go beyond the digital sector. Decades on, the VHS-Betamax *"format wars"* remain a textbook example of how significant network effects can cause a market to "tip" to VHS even in the "analog" world.[5] There are also examples of network effects and tipping in markets ranging from financial infrastructure through to payment systems and telecommunications.

Furthermore, a sectoral-only tool raises the prospect of sterile disputes over "jurisdiction" rather than focus on substance. As the impact of digitalization spreads, the line between markets that are and are not digital is likely to become difficult to discern and arguably less relevant. When, for example, would the payment system sector be sufficiently digitized for the NCT to apply and would it then only apply to the digital challengers or also to the (non-digital) incumbents? And the NCT would risk becoming redundant or only of narrow relevance as technology and industry advances if it is too narrowly drawn.

A sectoral-only tool would, finally, also be open to charges of discrimination by prejudging that structural competition problems are likely to exist in certain sectors. If it is necessary to limit the scope of the NCT to sectors "prone" to certain issues, one could infer that these issues cannot be easily identified on a case-by-case basis, and that it may be more appropriate to rely on *ex-ante* sectoral regulation.

(ii) The outer limits of the NCT (Option 3)

While Option 3 has the advantages of a wide reach and will potentially capture many, if not all, of the competition concerns which cannot be addressed effectively with the existing Article 101/102 tool kit, it also raises the question of what should be the outer limits of the NCT. This has two key dimensions:

[5] H. Ohashi, 2004, *The Role of Network Effects in the US VCR Market, 1978–1986*, Journal of Economics & Management Strategy. On the significance of those network effects, Ohashi considered that with a minor strategic adjustment the market could have just as easily tipped in the other direction: *"if Sony, the system sponsor of Beta, had aggressively introduced its VCRs at the early stage of competition, Beta would likely have dominated the market in 1985; instead, the format disappeared in 1989."*

- Competition / consumer policy: should the NCT solely address market failures stemming from competition problems (competition policy) or also those relating to other policy objectives (notably consumer policy)?
- Public / private domain: should the NCT address market failures stemming from EU or national government intervention through legislation and decisions etc. (public domain) as well as from private actors (private domain)?

To put this into context, it is instructive to look to the Market Investigation Regime ("MIR") in the UK – which on the surface – has potential similarities with Option 3 set out by the Commission. Under the MIR, the CMA can address market failures stemming from both competition and consumer policy as well as those stemming from the public as well as the private domain. In the first instance, the CMA has reviewed both conventional competition issues (e.g. exclusionary conduct by dominant firms, see *BSkyB Market Investigation (2012)*) and unconventional competition policy (e.g. exploitative conduct by dominant firms, see *BAA Market Investigation (2009)*.[6] The CMA has, however, also reviewed issues that stem from issues of consumer policy (e.g. exploitative conduct where a proportion of customers do not switch due to inertia *UK Energy Market Investigation (2016))*.[7] In the second instance, the CMA has also identified where UK regulation or legislation is hampering the effective operation of markets and put forward recommendations for legislative and regulatory reform (e.g. *UK Energy Market Investigation)*.

Competition policy vs consumer policy

First, Microsoft considers that, on balance, the NCT should solely focus on competition policy issues.

The distinction between competition policy and consumer policy is encapsulated in the question of whether the NCT should solely protect the integrity of the market mechanism by intervening where necessary to ensure "effective" competition takes place (competition policy) or whether it should also intervene to pursue wider issues of consumer policy (e.g. fair distribution of the benefits of competitive process). If the former holds, the NCT would only address structural competition problems that stem from the supply side (e.g. where firms have sought to restrict multi-homing). If the latter holds, the NCT would also address structural "competition" problems stemming from the demand side (e.g. where consumer inertia means that *some* customers do not stimulate and do not benefit from the competitive process).[8] That said, the line between competition policy and consumer policy is not always clear cut: firms may adapt practices which exploit consumer behavior. Such practices can however be addressed as part of extended competition policy (e.g. where firms tacitly collude).

Microsoft believes there are strong policy and economic reasons for limiting the scope of the NCT to competition policy issues.

- The NCT would be based on a single well-understood policy objective consistent with the Commission's existing competition powers. Were the NCT to embrace consumer policy issues, the Commission's mandate would expand to consumer policy in which it has no existing experience.
- The Commission would not have to consider more complex regulatory trade-offs generated by consumer policy considerations (e.g. whether some consumers should be protected to the longer-

6 Competition Commission, *Movies on Pay-TV,* Final Report, 2012.
7 Energy market investigation, Final Report, 2016.
8 See contribution of BEUC in the OECD Summary of Discussion of the Roundtable on consumer-facing remedies (available here: https://one.oecd.org/document/DAF/COMP/WP3/M(2018)1/ANN3/FINAL/en/pdf

term detriment of the competitive process) for which it is currently less well suited given its core competition policy mandate.

- In a similar vein, the Commission would not be drawn into overtly political issues. Consumer policy and, more broadly, the trade-off between competition policy and consumer policy would involve issues of economic distribution within European societies which are more properly the remit of legislators.

The UK's market investigation regime illustrates the complexity of trade-offs between competition policy and consumer policy. For example, the CMA's energy market investigation, saw the CMA balancing the protection of passive consumers' interests against the long-term concern that intervention would undermine the competitive process (by disincentivizing consumers from driving competition).[9] In deciding against a broader price cap the CMA noted that "*there were material risks of adverse consequences from the introduction of a price cap for a large number of customers which outweighed the short-term reduction of detriment"* but that the dissenting opinion of one panelist represented a *"difference in view [which] reflects, in part, members' respective judgements on the likelihood that better outcomes will be delivered through competitive markets with more engaged customers over the next few years."*[10] Such differences of opinion highlight that these issues require circumspection as well as an ability to make complex policy trade-offs and public value judgments which pure competition authorities are typically ill-suited to make.

Public domain and private domain

Second, the Commission will need to make the sensitive decision of whether to address market failures stemming from legislation or regulation at either the Member State or EU level. Microsoft observes that the Treaties already provide – to a limited degree – such powers. So-called "gap filling" means that national legislation and regulation which axiomatically leads to an infringement of Article 101 TFEU or Article 102 TFEU is prohibited.[11] Furthermore, given the objective of the NCT to address "structural competition problems" in full, it would be appropriate for the Commission to be able to address concerns regardless of whether they stem from private or public conduct.

C.2 Early identification of suitable remedies

The NCT also raises question of how and when the Commission will determine suitable remedies for an instrument which would address a significantly wider range of potentially problematic conduct and market features than the Commission's existing powers.

Microsoft strongly suggests that the NCT would be more robust if the Commission is required to identify a plausible remedy at an early stage of the investigation. There are two reasons why such an obligation is justified**:** first, the potential benefits to intervention in terms of effectiveness of remedies must be sufficiently concrete and likely to justify the significant costs of a market investigation (particularly in the absence of any deterrent effect); and, second, for the NCT, more than for other competition mechanism, it is the remedy which determines the relevant counterfactual. In other words, the remedy considerations are not a separate workstream following the competition assessment, they are an integral part thereof, setting the overall framework in which the analysis takes place.

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9 Energy market investigation, Final Report, 15.43-15.48.
10 Energy market investigation, Final Report, 15.48.
11 Julio Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community,* Hart Publishing, 2002.

(i) Cost benefit considerations

A requirement to identify a plausible remedy at an early stage would be a simple insurance mechanism against the risk that significant costs are incurred before the Commission is able to conclude that there are no suitable remedies to address the relevant concerns.

The Commission's existing powers require the identification of an anti-competitive act (e.g. an agreement or unilateral conduct) which, in turn, typically gives a straightforward remedy: prohibition of the relevant agreement or conduct. Only in limited circumstances do the Commission's existing powers require mandatory remedies (e.g. abusive refusal to supply requires the Commission to mandate access). This, in turn, means that the costs of intervention and the likely availability of remedies should be (relatively) straightforward: the Commission need only evaluate the costs and ability to reverse the anti-competitive act.

In contrast, the NCT would have a significantly wider scope and thus a universe of potential structural problems. And while the NCT may in theory be capable of identifying a large number of market imperfections and resulting concerns, not all of them can be effectively remedied nor are the countervailing costs of such remedies straightforward. To illustrate this, one of the Commission's key concerns is maintaining competitive pressure on market "gatekeepers" and ensuring that markets do not unduly "tip" towards a single platform. There are a range of theoretical remedies for such concerns: e.g. facilitating multi-homing. These remedies carry, however, different costs (e.g. the differing disincentive effects on investment from such interventions) and may be more or less feasible depending on the circumstances.[12]

A requirement to identify a plausible remedy at an early stage would thus ensure that the costs of an in-depth investigation would only be expended if there is a reasonable prospect of any concern (should it exist) being capable of being remedied (without the cost outweighing the benefits of intervention). This approach would be consistent with the UK market investigation regime which provides that the CMA should, *inter alia*, only consider launching a market investigation where (i) *the scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response;* and (ii) *'there is a reasonable chance that appropriate remedies will be available.'*[13] This can also be seen in practice. For example, the CMA opted not to take refer *Online Platforms and Digital Advertising (2020)* for a market investigation despite having identified *prima facie* concerns because the CMA did not, in part, have suitable remedial powers to address the relevant issues.[14]

(ii) Remedy as determinant of the counterfactual

Furthermore, at a more technical level, it is important to define the correct counterfactual against which to measure intervention under the NCT.

In the case of a merger control and the control of restrictive agreements, the identification of the counterfactual is relatively straightforward: For merger control, this is a world in the absence of the merger which in most (but not all) circumstances means the continuation of the status quo; for restrictive agreements, the counterfactual is the world without the restriction or, if the restriction is ancillary the world

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12 See the "topsy-turvy principle" outlined first by Jean-Charles Rochet and Jean Tirole, *Two-Sided Markets: An Overview,* 2004.

13 OFT, *Guidance on Market Investigation References, 2006* (see here, original text has been adopted unamended by the CMA).

14 Online platforms and digital advertising, Market study final report, 1 July 2020 (here), see 9.30. The CMA's decision rested *"primarily on whether [a market investigation] is the most appropriate and effective mechanism for delivering the kinds of interventions we are proposing".*

without the agreement. Because the factual and counterfactual are obvious in these instances, the competitive analysis and the remedy considerations often appear separate from each other.[15] This however is not always the case. Some abuse of dominance cases, where the situation is more complex, provides an illustration: while it still holds true that the counterfactual is a world without abuse, the nature of the abuse is defined by the remedy. A remedy which imposes an obligation to sell products separately means that the abuse was a tying abuse; by contrast, a "must carry" remedy (mandatory remedy) implies that the dominant firm has committed an unlawful refusal to supply. Both remedies lead to very different counterfactuals, namely a world in which products will be sold separately (in the case of an unbundling scenarios) versus a world in which the dominant players and its competitors bundle their products together with the dominant product.

In the case of the NCT, the competitive analysis and the remedy are even more intertwined through the counterfactual. Contrary to the other competition instruments, there exists no anticompetitive act (whether anticompetitive merger, restrictive agreement or abusive behavior) and hence there is no "natural counterfactual"; merely a list of potentially problematic market features and an even greater list of potential remedies to address the problematic features. For an NCT investigation, the factual is the status quo, i.e. the world as we know it, and the counterfactual is the world with whatever remedy or remedies the Commission may wish to impose.

For example, where the problem is perceived as a lack of interoperability is the appropriate counterfactual a scenario where partial or full interoperability is permitted and are all firms or only the dominant firm deemed to be providing interoperability? Equally, in the context of the MIR, the Competition Commission found, *inter alia*, a lack of competition for airports around London due to BAA's dominant position for operating such airports and required BAA to divest Gatwick and Stansted (while keeping Heathrow).[16] The counterfactual was thus defined by the divestment obligation as this set the counterfactual for evaluating the costs and benefits of intervention.

Absent clarity on the nature of the remedies, the Commission will not be able to define the counterfactual and hence not able to carry out its competition assessment.

D. Consistency safeguard

Microsoft submits that the NCT must be consistent with the Commission's existing competition powers so as not to undermine the coherency of EU competition policy.

EU competition law has made significant strides to increase the consistency of treatment for similar conduct in the application of its various policy instruments. The analytical framework between merger control, control of restrictive agreements and abuse of dominance has converged, and competition law has been adapted and applied in a consistent yet effective way in new markets. Significant progress has, for example, be made in terms harmonizing the definition of restriction of competition, including an increasingly aligned distinction between "object" restrictions/conduct across Article 101 and 102 TFEU (i.e. acts which have no plausible efficiencies justification and are presumptively harmful) and "effects" restrictions/conduct (i.e. acts which have a plausible presumption of potential efficiencies and no presumptive harm). Additionally, a common test for countervailing efficiencies under Article 101(3) and "Article 102(3)" has emerged, and at a

[15] Pablo Ibanez-Colomo *'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping'*

[16] Case 1110/6/8/09 *BAA Limited v CC,* CAT 35, 2009.

narrower level, the as efficient competitor standard has helped to bring consistency across different heads of pricing abuse under Article 102 TFEU.

The benefits of internal consistency of competition law in the treatment of conduct with similar market effects are twofold: first, consistency avoids market distortions; market participants will not be incentivized to adjust their behavior in a purely technical way so as to benefit from a more lenient regime, for example, structuring a JV in such a way as to benefit from concentration privilege. Second, consistency avoids "regulatory arbitrage" by the Commission; there is no temptation to characterize an arrangement in a particular way in order to lower the burden for infringement.

While the NCT Consultation focuses on how to achieve a *'smooth interaction'* between the NCT and sector specific legislation (e.g. in financial services and telecoms), Microsoft submits that it is equally important that the NCT fits into the existing competition law toolbox in a way which does not conflict with existing tools.[17]

As Microsoft favors Option 3 over the alternative options, this submission will focus primarily on the consistency issues raised by the market-structure-based Option (see Section D.1); but we will also briefly touch upon the consistency problems raised by the dominance-structure option (see Section D.2)

D.1 Consistency challenge for the market structure-based tool

As outlined in the Commission's inception impact assessment, the market structure-based tool would address problems *'which cannot be addressed (at all or as effectively) under the EU competition rules'*. This is comparable to the rationale and scope of the UK MIR. However, under this type of regime, complex consistency issues arise in relation to the identification and separation of the distinct problems that the tool is intended to address.

(i) Need for a priority rule

In the first instance, where the scope of the NCT overlaps with the Commission's existing powers, Microsoft believes there should be a priority rule for determining whether it is more appropriate to address the issues with the NCT or the Commission's existing powers.

While a market structure-based tool would cover issues outside of the scope of the Commission's existing powers, the NCT would, in this guise, also address issues which ostensibly fall within the scope of the Commission's existing powers but where the NCT is the more appropriate policy instrument. In theory, the legal doctrine of *lex specialis derogat legi generali* (a special law derogates from a general law) already provides a basis of priority. The principle holds that a law governing a specific subject matter – in this case, existing application of Article 101 and 102 TFEU – should override a law governing more general matters – in this case, the broader scoped NCT.[18] The Commission should thus only use the NCT where the Commission's existing powers do not apply.

This rule is, however, too black and white for the NCT which, as the Commission outlines in the IIA, is intended to address circumstances where the existing rules do not *'effectively'* deal with the underlying concerns (i.e. where there is a plausible overlap). Addressing similar concerns with multiple tools requires a clear and predictable set of rules which dictate the circumstances in which one or another instrument is applicable. Specifically, the priority rule must identify the scenarios where the existing competition rules are

[17] Consultation Questionnaire, Question 29.

[18] The doctrine is relevant in particular where two provisions pursue the same objective and have contradictory elements. See Case C-199/11, *Commission v Otis NV and others,* Opinion of AG Cruz Villalón, 2012, para. 26.

not "effective" and the NCT applies. This would be in keeping with the UK's market investigation regime which provides that a market investigation should only address problems within the scope of its conventional competition tools where (a) it has *'reasonable grounds to suspect'* that there are *'features'* of a market distorting competition but does not have sufficient grounds to establish a breach of its conventional competition tools or (b) action under its conventional competition tools *'is likely to be ineffective.'*[19] More specifically, the CMA's guidance on market investigation references outlines that the great majority of references are likely to involve industry-wide market features or multi-firm conduct, for example, networks of parallel vertical agreements, non-conduct based harm or tacit collusion, and that single-firm conduct will generally be dealt with under existing competition rules, save for where the conduct is derived from certain structural features of the market which themselves have adverse effects.[20]

In light of the above, Microsoft believes that legal certainty would be significantly enhanced by a priority rule between the NCT and the existing competition rules (and whether there would remain a role for the Sector Inquiry at all should be considered). To be effective, the priority rule must clearly outline the type of cases where the NCT is more appropriate (e.g. where market-wide remedies are required).

(ii) Application of consistent standard

Furthermore, Microsoft believes that the NCT must also apply a legal standard for intervention that is consistent with EU competition policy and, in particular, the Commission's existing competition instruments.

Even where the NCT is addressing issues within the scope of the Commission's existing powers, it is important that a similar standard for intervention applies:

- A move away from precedent would unjustifiably disregard the Commission's and the EU Courts' decades of experience and accumulated practice on the appropriate treatment of different types of conduct and market features. EU jurisprudence applies, for example, different standards for intervening where a dominant firm is engaging in exclusive dealing (effects- standard) and where a dominant firm is refusing to deal (indispensability-standard): this reflects the assessment of the relative merits of intervening in such circumstances.[21] If the NCT is intended to relax existing requirements under case law, for example, relating to the essential facilities doctrine or to market definition in dominance cases, it would be better to address these issues directly in a way which is consistent with the existing framework. Otherwise, the creation of an alternative standard may create a regulatory incentive to use the NCT over the Commission's existing powers (or *vice versa*), which would work to the detriment of legal certainty and deterrence value established under Articles 101 and 102 TFEU.

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19 OFT, *Guidance on Market Investigation References, 2006* (see here, original text has been adopted unamended by the CMA).

20 Ibid, *paras* 2.2 to 2.8. Nevertheless, in some instances, UK market investigations have focused on concerns that would also fall within the scope of the CMA's conventional competition tools. For example, in *Movies on Pay-TV*, the theory of harm was that access to movie content was a 'significant' factor in consumers selecting a pay-tv provider and Sky's control meant that other pay-tv providers could not compete effectively. The theory of harm was thus a de facto abuse case pursuant to Article 102 TFEU whereby Sky was allegedly refusing to supply or degrading supply of an essential input.

21 P. Ibanez Colomo, *Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping*, Journal of European Competition Law & Practice, Volume 10, Issue 9, November 2019, Pages 532–551.

- This calculus does not change materially due to the absence of fines or infringement decisions.[22] The standards set under Article 101 and 102 TFEU focus primarily on the costs and benefits of intervention without consideration for whether a fine will ultimately be imposed.[23] Furthermore, Article 101 and Article 102 TFEU are flexible instruments that permit both commitment decisions (i.e. no infringement and no fine) and infringement decisions without a fine. As such, the fact that the NCT would not involve an infringement decision should not affect the standard set for intervention under the NCT.

Moreover, an approach consistent with existing precedent would not undermine the aim of the NCT to permit earlier intervention. It is possible to achieve this goal by creating rules which are complementary to rather than conflicting with Articles 101 and 102 TFEU while expanding the scope of the NCT to address conduct and market features (allowing intervention so that markets can "self-right" by improving the market mechanism).

On the other hand, even where the NCT is addressing issues outside the scope of the existing rules, it remains important that similar standard for intervention is applied. This is to ensure the coherency of EU competition policy. The NCT is, for example, expected to address structural competition problems stemming from unilateral conduct of non-dominant firms (e.g. in relation to limitations on multi-homing). Such conduct is – rightfully – presumed to be less likely to harm competition than conduct by dominant firms. It would be paradoxical then if the NCT were to apply a lower standard of intervention to such conduct that Article 102 TFEU applies to unilateral conduct by dominant firms. More practically, it would also create a perverse regulatory incentive to prioritize investigations of conduct which in principle is less likely to be harmful due to the lower standard for intervention (and thus the greater ease for successfully intervening).

(iii) Remedies

Finally, Microsoft believes that the NCT should be equipped with remedial powers consistent with the Commission's existing powers and proportionate to the structural competition problems that are ultimately within its scope.[24]

Ensuring consistency – in principle – with the Commission's remedial powers for Article 101 and Article 102 TFEU would not unduly hamper the NCT. Indeed, the Commission's existing remedial powers provide, in principle, the ability to impose any form of structural or behavioral remedy on private actors. Under Regulation 1/2003, the Commission is entitled to impose *'any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.'*[25] While the market structure-based tool would cover a significantly wider range of issues and thus inevitably a wider set of regulatory solutions, the Commission's existing powers already provide significant flexibility. There is thus no need to expand or loosen the Commission's already significant remedial powers under competition policy.

Microsoft believes, however, that the Commission's powers under the NCT should be limited to ending the structural competition problem or the cause of a structural competition problem – but not the effects of that problem. In other words, the Commission's remedial powers should be restricted to improving the competitive process. Where it is unable to improve the competitive process, it should not have broad powers

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22 Amelia Fletcher, *Market Investigations for Digital Platforms: Panacea or Complement?* Centre for Competition Policy University of East Anglia, 6 August 2020.
23 Wouter Wils, *Optimal Antitrust Fines: Theory and Practice,* World Competition Vol 29, No 2, June 2006.
24 Consultation Questionnaire, Questions 30 – 32.
25 Article 7, Régulation 1/2003.

to impose, for example, industry price regulation. Such measures are better left to sector specific regulators and, if necessary, the Commission could make recommendations as such. This ensures consistency with the Commission's existing powers (which are limited to ceasing the infringement) as well as ensuring that the Commission does not become a *de facto* sectoral regulator.

D.2 Consistency challenge for the dominance-based competition tool

As outlined in our response to the inception impact assessment, Microsoft does not believe that a dominance-based tool would be suitable to address the full scope of the concerns outlined by the Commission. Furthermore, Microsoft also notes that a dominance-based competition tool would also give rise to an obvious and inherent issue of consistency.

In simple terms, the NCT would become an instrument to circumvent the higher standard imposed by Article 102 TFEU (in at least certain circumstances). This can be inferred from the IIA which provides that the dominance-based tool is intended to enable intervention *'before a dominant company successfully forecloses competitors or raises their costs'.* The overlap between Article 102 TFEU and the new tool is thus part and parcel of the objective of enabling earlier intervention. However, the corollary to "early intervention" is that the NCT will carry a lower standard than Article 102 TFEU in order to permit intervention where establishing the elements of an abuse under Article 102 TFEU presents too high a bar. Otherwise, the Commission would have two instruments (the NCT and Article 102 TFEU) that largely achieved the same policy objectives.

While a lower standard may of course be merited (delayed intervention may, for example, not be sufficient to preserve effective competition in some (fast-moving) markets), the Commission's proposal this would result in conflicting legal standards which pursue similar objectives for the same conduct, creating a strong regulatory incentive to bring cases under the new tool wherever possible. This would render nugatory the deterrence value of Article 102 TFEU, essentially reducing its practical scope to cases where harm has already occurred, and no remedial action is necessary or possible. Where it is seeking remedies rather than an infringement decision, the Commission will have little incentive to pursue the higher standard under the traditional route given the likelihood that the NCT will carry enhanced remedies powers.

As set out above, Microsoft thus considers reform to Article 102 TFEU the more appropriate solution as it avoids having two conflicting instruments to address the same conduct. More specifically, given that the Commission's principal charge seems to be the lack of administrative flexibility to intervene early in cases, reform and expansion to the "interim measures" regime may be an alternative route to achieve the desired purpose.

E. Procedural safeguards

Procedural safeguards are key for maintaining the objective and transparent application of competition policy (and ultimately for maintaining support for the system). Procedural safeguards should be proportionate to the restriction of rights that the new powers entail and the costs which result from their exercise. In particular, these must ensure that the rights of defense of the affected parties are protected and that the process cannot be abused for political reasons or otherwise misused.

Some inspiration may be drawn from the UK market investigation regime which has an elaborate set of procedural safeguards to ensure due process for these wide-ranging investigations, including a two-phase process and separation of decision-makers between Phase I and Phase II. These ensure that the MIR is

not used or perceived as a "shortcut" to traditional competition enforcement, and that any remedial actions considered are based on a detailed and thorough assessment.

E.1 The right structure for the investigative process

(i) A two-stage procedure

Microsoft believes that the NCT investigative process should be subject to a two-stage process. The first phase should be concerned with establishing whether a prima facie structural competition problem exists and whether it can be remedied under the NCT, and the second phase should be primarily concerned with determining which (if any) remedies are appropriate and proportionate.

The separation of these processes is appropriate for a few reasons. First, the two issues will be subject to separate substantive assessments which will require differing levels of information gathering and rigor. Second, the possibility of remedies will require affected parties to incur significant additional costs in order to ensure fair treatment. Third, the Phase I / Phase II model has the advantage of being well known in the context of existing EU competition law procedure, for example in the context of the EU merger regulation.

Furthermore, Microsoft considers that the proper implementation of a two-stage NCT process would require the Commission's Sector Inquiry tool either to be discarded, or for its use to time-bar the opening of an NCT investigation. This will be necessary to avoid the Sector Inquiry tool being used as the *de facto* "Phase 0" or "prenotification phase" of the NCT.

(ii) A strict legal test for opening a Phase II investigation

Phase II investigations will generate significant costs, both administratively and for the market participants involved. As such, they should not be used as a tool for the Commission to engage in "fishing expeditions" where lengthy investigations are launched without a clearly defined theory of harm and without plausible remedies in prospect.[26]

The Commission may currently open a sector inquiry where it considers that a market is not working as well as it should and where breaches of competition rules may be a contributory factor. The Commission may consider a similar test for the opening of a Phase I NCT investigation, adjusted to reflect a concern of "structural competition problems". However, stricter legal test for Phase II is necessary because of the significant additional costs associated with the NCT's remedial powers. This rationale is line with the experience in the UK market investigation regime where over time the (preliminary) market study has developed into a Phase I investigation which may (or may not) lead to a market investigation reference (*de facto*, an in-depth investigation) if the requisite legal test is satisfied.

The threat of market-wide remedies will effectively force companies subject to an NCT investigation to invest significant resources to make their case why significant remedial intervention is unnecessary. Microsoft therefore submits that the legal test should require the Commission to outline potential remedies, both to ensure that there are plausible remedies in contemplation (as discussed under section C) but also

[26] This follows from the duty to give reasons which is a basic principle of EU law arising from Article 296(2) TFEU and under Article 41(2)c) of the Charter of Fundamental Rights of the European Union. The obligation to give reasons is specific to the legal basis of the action and must disclose in a clear and unequivocal fashion the reasoning leading to the adoption of the decision so as to enable an affected party to challenge the decision by judicial review.

to provide the affected companies sufficient explanation of the nature of the investigation in order to properly make their defense as to why remedies are not required.

(iii) A "fresh pair of eyes"

Microsoft believes that the Commission should reflect the UK's "fresh pair of eyes" approach in a way which is compatible with the institutional and procedural set up at EU level, building on and strengthening the oral hearing procedure under existing merger and antitrust investigations.

Under the UK market investigation regime, there is a division of powers between the decision to refer a market investigation and the market investigation itself. This used to be split between the Office for Fair Trading and the Competition Commission respectively, but even upon the on the creation of the CMA, the split was maintained, with the first decision taken by the CMA Board, and the market investigation run by independent decision makers. No overlap of personnel between the two is allowed. The market investigation is therefore a new independent investigation which looks at the market with a *"fresh pair of eyes"*.[27]

The administrative model of antitrust in the EU has sometimes been criticized given the Commission's role as "judge, jury and executioner" of antitrust cases.[28] While this criticism has been levied in the context of the application of pure antitrust rules, where relatively consistent legal tests have been developed, Microsoft considers that there is an even greater need for a *"fresh pair of eyes"* when considering new types of issues (e.g. *"suboptimal"* market structures) under the NCT, for which consistent legal tests may take time to develop.

That said, while the panel model is compatible with the UK competition system with its long history of institutional separation (stemming from the previous split between the OFT and Competition Commission) – it would be somewhat alien to EU competition law. Over the years, the Commission has developed a number of procedural safeguards which in some cases, have not had the full desired effect. In particular, the oral hearing procedure has previously been criticized by the OECD which noted among other things that neither the ultimate decision-maker – the College – nor the Competition Commissioner were required to attend the oral hearing.[29] The NCT may present an opportunity to reinvigorate existing procedural safeguards, or develop new safeguards, in the context of a new process, which if successful, could be translated into existing merger control and antitrust procedures. For example, in the context of the current EU competition law procedure, the oral hearing comes at a relatively advanced stage in the antitrust and merger control procedure which arguably reduces its effectiveness as a procedural safeguard. Indeed, the limited perception of effectiveness of the oral hearing as a right of defense is highlighted by the fact that many affected parties decline the option to attend a formal oral hearing. Instead, Microsoft submits that given the significant cost associated with market investigations, the Commission should take the opportunity to strengthen the oral hearing procedure, which could instead be used at an earlier stage to decide whether or not to open a Phase II investigation, involving key decision makers at that point in the process.

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27 See Competition Commission, *Guidelines for market investigations: Their role, procedures, assessment, and remedies,* 2013, para. 22. The original text has been retained unamended by the CMA board.

28 For discussion of this point, see P. Marsden, *Checks and balances: EU competition law and the rule of law,* 22 Loy. Consumer Law Review 62, 2009.

29 OECD, *European Commission – Peer Review of Competition Law and Policy*, 2005.

E.2 Timing safeguard

Microsoft considers that the legal tests in NCT investigations should be bound by strict deadlines by which it must conclude Phase I and Phase II of its review. This follows the approach from the UK's market investigation regime, where the CMA must conclude a market study (*de facto* Phase I) within 12 months and must then conclude any market investigation (*de facto* Phase II) within 18 months from the date that the reference is made (extendable by six months exceptionally).

Given the potentially burdensome nature of an investigation (particularly where the firms are not alleged to have infringed competition law), it is important that Commission's powers of investigation under the NCT do not result in drawn-out investigations (with their deleterious effects on the businesses under scrutiny). A time-limit will also help to ensure a focused nature to the investigation, ensuring that potential remedies are considered (and market tested) at an early stage, promoting efficient use of public and private resources. Moreover, in addition to avoiding the additional procedural costs of lengthy investigations, a time-limit on the market investigation also has the benefit of supporting the rationales that the NCT should allow the Commission to intervene before consumer harm has occurred (or worsened).

Microsoft believes that there are two important elements to ensure that timing safeguards have the desired effect on the NCT process.

Firstly, Microsoft submits that the NCT should impose a general time limit for the conclusion of a Phase I investigation (and the decision whether to open a Phase II investigation), as well as a final deadline for the conclusion of Phase II investigations by which point the substantive findings must be made *and* the remedies (if any) imposed. This approach would be broadly in line with the UK's market investigation regime. The Commission may also consider shorter timelines for remedies that are recommendations to governments/public bodies and longer timelines for actual orders to undertakings (given the need for additional scrutiny).

Secondly, the Microsoft submits that the NCT must have appropriate safeguards to prevent circumvention of the timing safeguard. In particular, as outlined above, unless it is integrated into the time limits as "Phase I" of the NCT process, the Commission should not be able to use a sector inquiry to *de facto* conduct a pre-NCT investigation. Equally, the Commission should not be able to abandon an NCT investigation and restarting anew to circumvent the time limits. As such, opening a new NCT investigation must therefore create a time-bar on the opening of another NCT investigation addressing the same issue or market. Finally, unlike merger cases, the parties affected by the investigation are unlikely to have incentives aligned to have the investigation concluded in a timely manner. Without a strict time limit on the Commission's side, and incentives for market participants to respond to information requests in a timely manner, NCT investigations are likely to incur significant delays which would undermine the effectiveness of the tool.

F. Judicial review safeguard

The final safeguard, and perhaps one of the most important for the legitimacy of the NCT, relates to the rights of affected firms to challenge the Commission's findings (and remedies) before the EU Courts. Microsoft draws attention to two important aspects of the right to judicial review.

F.1 Clear judiciable tests tailored to the remedy imposed

Firstly, Microsoft submits that the substantive legal tests for the NCT must be sufficiently clear and precise to enable affected companies to challenge the Commission's findings. To adequately safeguard the rights of defense, this must allow affected firms to challenge not just the Commission's findings of structural

competition problems, but also to challenge the suitability and the proportionality of the imposed remedies. This means that the appropriate legal test for the imposition of remedies should be linked to the nature of the remedy (e.g. different standards for structural versus behavioral remedies). Otherwise, the Commission would have free reign to impose any remedy it desires once it establishes a structural competition problem. Microsoft therefore submits that separate, judiciable tests for remedies of different nature will be necessary for the EU Courts to safeguard the rights of defense and represent an effective check on the Commission's power.

F.2 Intensity of judicial review

Secondly, Microsoft submits that the scope and intensity of judicial review of the EU courts should be the same as for antitrust and merger control decisions.

Aside from unlimited jurisdiction on fines, the judicial review of the legality of competition decisions is limited in scope, as the General Court is not entitled to substitute in its own judgment for that of the Commission. However, the intensity and thoroughness of this legality review requires the General Court to scrutinize in painstaking detail the robustness of the Commission's conclusions. This has been demonstrated on a number of occasions, most recently in *CK Telecoms UK v Commission,* where the General Court annulled the Commission's decision to prohibit the merger between Three and O2 in the UK, finding that the Commission's theories of harm were too vague did not demonstrate a *"strong probability"* of the existence of significant impediments to effective competition.[30]

Microsoft submits that the NCT should be subject to the same high intensity of judicial review as for other competition decisions, regardless of whether the NCT does not provide for fines or infringements. It has been consistently held in this regard, in both merger[31] and antitrust[32] cases, that the Commission's margin of appreciation in economic matters should be limited by the Court to ensure that "*the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it".* Indeed, the intensity of the General Court's review of the legality of Commission decisions does not notably vary between *quasi-criminal* antitrust decisions and merger decisions (which similar to the NCT, have no fines or infringements attached).[33]

Moreover, it would be harmful to afford the Commission a greater level of discretion in NCT investigations than it has in respect of other areas of competition law. Firstly, given the broad scope of (Option 3) of the NCT, and more importantly its broad remedial powers, it would be counterintuitive to have less scrutiny of Commission decisions given the significant potential impact on private interests. Secondly, more intense scrutiny of the Commission's decisions helps rather than weakens enforcement, as it encourages rigor within the decision-making process and helps to sharpen its own internal decision-making process. In the context of the NCT, which would create new administrative powers and where there is no clear precedent to draw on, the Courts must have an active role in shaping the boundaries in order to ensure a consistent

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30 Case T-399/16, CK Telecoms UK Investments Ltd v European Commission, ECLI:EU: T:2020:217, para. 118.

31 Case C-12/03 P, *Commission v Tetra Laval,* EU :C:2005:87, 2005, para. 39 ; Case T-399/16, CK Telecoms UK Investments Ltd v European Commission, ECLI:EU:T:2020:217, 2020, para. 76.

32 Case T-201/04 *Microsoft Corp. v Commission*, ECR II-3601, 2007, paras. 87-89.

33 Some have even argued that, in light of judgments in *Airtours, Tetra Laval,* and *Schneider Electric,* that the EU Courts have been more prepared to comprehensively review the economic analysis in merger cases than in antitrust cases. See Ian Forrester, *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 28.

application of EU law. In this regard, the NCT should avoid following the approach under the UK market investigation regime, where the limited intensity of judicial review has resulted in few substantive challenges, having limiting effects on legal certainty and resulting in a lack of balance.

31 August 2020