CNMC POSITION PAPER

for the public consultation on the Digital Services Act (DSA) and a New Competition Tool (NCT)

Starting premises

- When we refer to digital markets or, even more specifically, to digital platforms, we are referring to very uneven sectors that may have very different economic characteristics.
- In many of these sectors (exclusively digital or in a growing process of digitalization) an asymmetry emerges in the regulation between the more traditional operators and those new operators who, by their very nature, have a more prominently digital profile.
- We are talking about sectors undergoing rapid transformation and with a significant weight of R+D+i in many cases, where the development of business models is subject to greater uncertainty.
- This requires special CAUTION on the part of the authorities:
  - ✓ Avoid over-regulation or regulation that distorts investment/innovation or creates entry barriers for smaller operators.
  - ✓ Avoid creating unnecessary uncertainty about markets. The adoption of new rules should in any event contribute to legal certainty for agents operating online platforms, especially because they act in different markets (and are subject to EU and national authorities) and unclear regulation may be a barrier to entry.
  - ✓ Minimize regulatory and responsibility overlaps that can generate legal uncertainty through a plethora of regulations.
  - ✓ Flexible framework: a rigid and time-consuming regulatory framework to design and implement is not the answer to such dynamic markets

How to focus analysis?

In this order…

1. **WHAT we pursue:** Need to focus what objectives we pursue, what problems we are trying to solve (from the CNMC perspective)
2. **HOW we get it**: Determine which instruments are most suitable (economic and legal point of view)
3. **WHO executes**: How to articulate the *enforcement* of these instruments

The order in which those questions are answered is crucial.

There is a certain risk that the answer to question 3 will condition the design of the instruments. This is not desirable (in other words, that different bodies or departments —DGCONNECT and DGCOMP for example— defend different instruments to preserve roles and responsibilities).

The questionnaires circulated by the Commission suffer from this problem. More attention should be paid to points 1 and 2 in the debate raised by the Commission.

1. WHAT WE PURSUE

The digital strategy presented by the European Commission pursues objectives of a different nature and involves different policies/authorities (holistic approach). Even if we stick to the *Digital Services Act package*, the objectives pursued are multiple (user security, platform responsibility, operation of digital services markets).

This document focuses on the objectives that have to do with the CNMC areas of responsiblity. In particular, given the content of the public consultations that have been launched, particular emphasis is placed on the efficient functioning of markets and the existence of an effective competition in them. However, other interrelated and highly relevant objectives, such as user protection, must also be taken into account in this exercise.

A separate document deals with audio visual issues, in particular, the user protection in the online environment against the exposure of any type of content

In promoting the achievement of the various objectives, it is important to bear in mind that:

- The *Digital Services Act package* should make a decisive contribution to promoting a single market for digital services, avoiding the partitioning of markets.
- The adoption of new instruments to regulate platforms should be avoided from being used as an industrial policy instrument (protection of certain industries or types of companies). Such objectives should be pursued through other means that do not distort competition.
- '*Level playing field*' must be interpreted according to the need to promote the different objectives pursued.

1. EFFECTIVE COMPETITION

- **Lack of definition in the problems**. There is a tendency to identify a number of potential generic competition problems associated with the functioning of the markets in which platforms operate according to the economic characteristics inherent to these markets.

  The Commission merely outlines potential competition problems based on DGComp cases in digital markets (Google/Android, Google/Shopping) and sets out the following typology in the consultation on the New Competition Tool.

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	Problems identified by the Commission
Structural risk for competition *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*	**Markets prone to tipping:** Risk of extension of market power/monopolization
	Abuse of economic dependence: unilateral strategies by non- dominant companies to monopolise a market through anti-competitive means
Structural market failure: *market is not working well and not delivering competitive outcomes due to its structure (i.e. a structural market failure)*	Tendency towards monopolization markets displaying systemic failures going beyond the conduct of a particular company with market power, due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation,
	oligopolistic market structures with an increased risk for tacit collusion, including markets featuring increased transparency due to algorithm- based technological solution

- The need for intervention is taken for granted without delving into the alleged competition problems to be solved. This results in uncertainty about the assumptions to which the regulatory instruments to be designed would apply (that is, would they apply in situations of significant market power, collective dominance, only when markets with barriers are detected...?)
- That is why the debate is focusing too much on HOW and above all on WHO to intervene, rather than WHEN to intervene. It is essential to further elaborate on the definition and specification of problems in digital markets or in other markets with characteristics that make them particularly prone to risks involved in digital markets, consider if traditional competition tools and existing ex ante regulation have been/are sufficient to address them, and specify in which situations intervention would be justified.
- Once this is clear, the diagnosis of whether the intervention is appropriate should be made market-to-market. The characteristics and business models of these markets, although they may have in common the existence of large platforms, are very different.
- Therefore, any initiative to be taken should be based on:

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- ✓ The need for intervention cannot be taken for granted. It is necessary to analyse in each case whether it is justified according to the characteristics of the market and the prospects for its evolution (need for dynamic analysis). In particular, it is necessary to define with some precision what the gap is compared to current Articles 101 and 102 (why they are not considered applicable or less efficient) and/or the existing regulation. This is particularly relevant if you opt for a fully horizontal instrument *(new competition tool*) that overlaps with ex ante regulatory frameworks of existing markets.

- ✓ When examining the adequacy of the application of Articles 101 and 102 and/or the existing ex ante regulation, it is important not to mix in this assessment other material aspects which may condition the effectiveness of Articles 101 and 102 (for instance, insufficient means should not lead to the decision that it is preferable to apply a new regulatory instrument).

- ✓ For reasons of legal certainty, it will be advisable to have tests that define whether in a particular market, given its characteristics and the problem raised, regulatory intervention is appropriate or not in order to moderate the power of a platform.

- ✓ Experience in regulating electronic communications markets can be useful here. Inspired by the '3-criteria test'[1], a test could be designed to decide whether intervention should be advisable. This test must necessarily include the adequacy of Articles 101 and 102 and existing ex ante regulation to address market problems.

- ✓ The burden of proof on the need for intervention should be borne by the authority, without prejudice to the imposition on operators of reporting obligations enabling the authority to analyse the appropriateness of intervention.

- ✓ The appropriateness of intervention should not be sustained by a lower burden of proof on the authorities to justify intervention. Otherwise we can fall into a sort of "*forum shopping*" of the authority, with the consequent risk of rendering the application of Articles 101 and 102 meaningless (opting for our ex ante regulatory instruments because they are 'more comfortable') and/or the traditional ex ante regulation. In this regard, there is concern about the approach taken by the European Commission to justify the opportunity of the *New Competition Tool*[2].

- ✓ In the design of this test it should be borne in mind that these markets may have different characteristics than those of electronic communications and that the speed of change may be even higher. Hence, it is probably necessary to adapt the test design to the reality of these markets. (section '*Main features of gatekeeper online platform companies and main relevant criteria for*

1 (i) Do potential entrants face **high barriers to entry**?; (ii) Is the market **trending towards effective competition**?; (iii) Is **competition law sufficient** to deal with any competition problems?

2 *The EU competition rules cannot tackle or cannot address in the most effective manner*

assessing their economic power' of the DSA package questionnaire and section 6 of the New Competition Tool questionnaire are key in this regard).

- ✓ Much attention is being paid to the risk of monopolization and dominance in this debate. Perhaps greater attention should be given to the risk of collusion, given the relative scarcity of tools available to the authorities to pursue it. This is equally important for achieving the benefits of the Single Market for Digital Services.
- ✓ Alternatively, if a model with several intervention instruments is used, the test should also clarify the way in which the intervention instrument applicable in each case is decided, always without prejudice to the application of Articles 101 and 102.

2. USER PROTECTION

Defending the interests of users is a fundamental objective that should not be missed throughout the debate on possible regulation of platforms.

As far as content is concerned, the protection of users is addressed in a separate note.

As far as access is concerned, principles must be taken into consideration to ensure that access occurs under appropriate conditions and by promoting the ability of the user to choose in relation to information and products-services. In this sense, it is important to take into account in the debate the portability of personal data, already provided for in the GDPR, article 20, among others. All of this without prejudice to the fact that portability can be a very relevant aspect when analysing the functioning of these markets and the possible remedies to be designed.

2. THE HOW

- It should be assumed that intervention to resolve competition problems will be limited to those markets which do not pass the test mentioned in the previous section.
- Experience tells us that when it comes to regulating you have to go individually market by market. General rules —even if they are set only for 'gatekeepers'— may function to regulate aspects of accountability or transparency, but it is difficult that they act as effective instruments for moderating market power.
- If an instrument only applicable to 'gatekeepers' is finally chosen, there is concern about how this concept would be defined. EU regulation should make clear what is meant by 'gatekeeper'.
- It is preferable to have, where appropriate, a single horizontal regulatory instrument whose implementation (analysis and design of measures) is carried out on a market-to-market basis.
    - ➢ What should be horizontal is the instrument, not the measures, which should be designed market-to-market on the basis of a necessarily flexible catalogue.
    - ➢ The definition of which services/goods/markets/operators fall within the 'Digital' can be complex, changeable in the medium term and a source of legal uncertainty. Horizontal instruments reduce these risks.
- It would be desirable to have a market analysis/ad hoc remedies design procedure for those markets that do not pass the test. In this regard:
    - ✓ Once again, procedures/systems must be designed as follows: a) agile; (b) effective and (c) reducing litigation. For this reason:
        - It will be necessary to identify the competition problems to be solved and to establish a way to weigh the potential damage to competition and the possible efficiencies arising from the market structure or the analysed behaviours. The burden of proof here will fall on the authority.
        - Any ex ante regulation applied should focus on proportional obligations on players acting as gatekeepers, i. e., players controlling market access for a large number of users, avoiding horizontal regulations that would place a burden on smaller or incoming players.
        - An open and flexible toolkit of obligations should be established to enable players and regulators to know in advance the potential obligations and to adapt the selection according to the principle of proportionality.
        - Once identified the problem, it may be preferable for the platform to propose the remedies and that there is a negotiation process, with the possibility for the authority to impose it if there was no agreement.
        - This process should include mechanisms for consultation and public hearing with the industry as a whole. Or even by means of negotiating tables or forums led by the regulator, especially in the design of

interoperability, portability or data sharing mechanisms, as has been done in telecommunications for numerical portability and other aspects.

- From the perspective of rights of defence and reduction of litigation, it will be important to determine the subjective scope of intervention (it is applied to 'nomatim' operators or to those in a certain abstractly defined position; how that is articulated with the proposal/negotiation of remedies process).
- In the event that the analysis results in recommendations for amending the regulatory framework, it should be clarified whether they have any degree of legal binding for the Commission itself (in the case of EU regulation) or to the Member States (in the case of national rules).

✓ Need to monitor remedies and to follow up on regulatory recommendations.

✓ Once remedies are imposed, it is desirable to have a dispute resolution mechanism, in line with the dispute resolution procedure between operators and between operators and other agents of the telecommunications sector, which can be very useful to guarantee the interpretation and *enforcement* of obligations between companies in case of discrepancy.

✓ Need for periodic review.

- **It is not advisable to design different ex ante intervention instruments**. Right now we are talking about two instruments ('new competition tool' and 'ex ante regulation of the DSA, proposal 3b') whose distinction is, at the very least, unclear.
- These instruments and, in particular, the new competition tool, raise the question of what would be their overlap with the sectors already subject to ex ante regulation (telcos, energy, etc.).
  - ➢ It seems logical (as the Commission points out) that the new instrument to be designed should not be available for use in markets already subject to ex ante regulation with a similar purpose, in order to avoid overlaps, shopping forum and legal uncertainty.
  - ➢ However, as the new instruments and, in particular, the NCT are emerging, we might find that the remedies to be applied in other sectors could be broader and more drastic than those applied in markets subject to traditional ex ante regulation, all of which seems to be a contradiction (i.e., that intervention in the pharmaceutical markets followed a more relaxed procedure and with stronger remedies — even disinvestments — than what is applied in telecommunications).
  - ➢ To solve this issue, it would be necessary to take into account in the test design to decide the intervention not only whether Articles 101 and 102 are sufficient, but whether the existing ex ante regulation is also sufficient. Ex ante regulation should be interpreted broadly here as those instruments at the disposal of the regulator to prevent the exercise of market power.

  - However, caution must be exercised, because this type of approach can lead to overlapping instruments that complicate the regulatory framework, create legal uncertainty and produce conflicts of competence.

- Ex ante regulation with a list of DON'TS (prohibited clauses) aimed at solving competition problems in so different and dynamic markets can be dangerous for the functioning of markets and economic efficiency. For example, sharing data is neither bad nor good per se. It requires a case-by-case analysis.

  A DON'T is a prohibition per se. Prohibitions per se in very heterogeneous and dynamic markets, where knowledge about the theory of damage and efficiencies is still inconclusive, are not advisable because a) the probability of error is high and b) the cost of it given the volume and/or growth of these markets may also be.

- An ex ante regulation with a DOs list doesn't make sense either. We build on the freedom of enterprise. Companies can do anything that is not prohibited as a matter of principle.

- The list of DOs and DON'Ts makes sense when there is a prohibition in the regulation to be delimited. That is, within the framework of Articles 101 and 102 (EU competition rules containing the prohibition of restrictive agreements on competition and abuse of dominant position), the Commission clarifies through the Regulation that certain agreements or practices are deemed to be prohibited or exempted in certain circumstances. In fact, the revision of the vertical restraints regulation is already taking this aspect into account.

- The list of DOs and DON'Ts can instead make sense for the achievement of other objectives, such as responsibility, user protection and platform responsibility.

3. THE WHO

- Until we have a clearer idea of the instruments, it is difficult to make progress on governance.
- Duplication of intervention instruments should be avoided:
  - ✓ Between ANCs and ANRs
  - ✓ Between different areas of the Commission
- As far as competition law is concerned, the horizontal nature of the rules and their application must be preserved as before, while trying to avoid sectorial specificities.
- In the case of supranational markets or problems that similarly affect a multiplicity of national markets, it makes sense that intervention takes place at the supranational level in order to avoid compartmentalization of markets.
- Should an ad hoc supranational authority for platforms be created?
  - ✓ It does not seem politically feasible.
  - ✓ It is difficult that there is no overlapping of powers with national authorities and with the Commission itself. There is a risk that we end up with more overlaps.
- There may be problems in domestic markets that have specific characteristics and may require particular remedies. In that case, the national authority may be best positioned to act.
- It does not seem, however, that the Commission is considering the implementation of the new instrument (or instruments) by the national authorities. In this sense, it is noteworthy that the Inception Impact Assessments do not seem to take into account the need for transposition[3].
- Regardless of the type of instrument and its scope, this new regulatory capacity of the Commission, applied exclusively and exclusionary, could clash with the sovereignty of the Member States to regulate markets and lead to Member States adopting their own instruments in an uncoordinated manner.
- It seems necessary to resort to the principle of best positioned authority in order to avoid overlaps, uncertainty and over-regulation. The 'market-to-market' approach allows to anticipate that the availability of this instrument for use by the Member States may be justified in a number of cases.
- Clear rules for the intervention on the allocation of competence should be established, which are not dependent on less predictable mechanisms such as coordination.
- In any case, there must be a reinforced cooperation between authorities to determine who intervenes (there is already experience in this in ex ante interventions such as merger control):

3 For example, there is no need for an implementation plan since all policy options consider the Commission as the enforcer of the New Competition Tool

Supranational markets or problems that similarly affect a multiplicity of domestic markets	National markets that have specific characteristics and may require specific remedies
Competent Commission on ex-ante regulation of platforms System for the participation of Member States in the design of this regulation. Need to define the role of Member States in decision-making (advisory committees with voice and/or vote). Possibility to delegate certain aspects of enforcement (e.g., surveillance of remedies in the domestic market) to National Authorities	What scope for ex ante intervention is left to Member States? We must try to avoid compartmentalization of markets. Mechanisms that allow to assign the case to the best positioned authority (Commission or National Authority), whether in the case of autonomous or delegated powers.

It is important, at EU level, to outline the function structure of the Commission and the possible functions that the Member States may have, and that these functions and roles are clearly defined. Leaving this issue very open can lead to certain drawbacks such as:

- Overlapping of different mechanisms between the European Commission and National Authorities to the detriment of the effectiveness of the model and the Single Market
- Very diverse institutional models between Member States that hinder cooperation
- Unproductive discussions between ministries and NRA, with the consequent loss of the experience accumulated in the NRA if the competence does not ultimately reside in them.

This probably requires:

- Amendment of EU legislation
- Transposition
- In our case, amendment of Law 3/2013 and, depending on what is being evaluated, amendment of Law 9/2014, of 9 May.

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In short:

- Do not take for granted the need for intervention. A test is needed to determine when intervention in a market is really necessary to protect effective competition, innovation and growth.
- This test may be similar to the 3-criteria test, including among them the sufficiency of articles 101 and 102 of the TFEU and the existing ex ante regulation to deal with competition problems in a market. The decision to intervene cannot be based on a lower burden of proof to intervene which empties the content of Articles 101 and 102 or other regulatory instruments.
- Avoid creating a plurality of instruments. Regardless of its name (NCT or 3b of the DSA Consultation) the instrument must be one.
- For reasons of efficiency, a horizontal instrument seems preferable: be able to carry out an analysis of any market, consider situations not limited to individual PSM and apply appropriate remedies on a case-by-case basis.
- However, there is concern about the fitting of this instrument in markets that already have ex ante regulation (telcos). Overlapping the instruments is not desirable, but excluding these markets means that intervention mechanisms in them would be less flexible and powerful, given what is now being considered. All this is a source of legal uncertainty in any case.
- National Authorities must also be able to apply the instrument to be designed. Clear rules for allocating this competence between the Commission and the Member State.
- We must defend that these powers reside in the CNMC as an independent authority.
- The regulation of general prohibitions for all platforms (DON'Ts or solution 3a proposed in the DSA Consultation) of any sector may be useful for the achievement of other objectives, but not for controlling the exercise of market power. It is complex to design DOs and DON'Ts applicable to all platforms and markets without creating problems on market efficiency, legal certainty, innovation, investment, etc.