The ACM supports EC initiative for a New Competition Tool

The ACM supports the initiative of the European Commission to consult on the possible introduction of a New Competition Tool (NCT). This tool should be complementary to the existing competition instruments (article 101, 102 TFEU and the Merger Regulation) and be able to address structural competition problems that cannot be tackled effectively by the existing competition instruments.

The ACM sees a clear need for an ex ante instrument that addresses possible competition problems in relation to digital platforms with gatekeeper positions. The ACM has outlined its ideas on this ex ante instrument in earlier position papers:

- https://www.acm.nl/sites/default/files/documents/2019-10/benelux-memorandum-over-toezicht-mededinging-in-digitale-economie.pdf
- https://www.acm.nl/sites/default/files/documents/ex-ante-tool_0.pdf

In its answers to the EC consultation on a New Competition Tool, the ACM has identified a number of potential structural competition problems which may not be addressed effectively or sufficiently efficient with the existing competition instruments. These are:

- scenarios of winner takes all (tipping) markets. The ex post character of Article 102 TFEU makes it not particularly well suited to prevent a market from tipping.
- digital platforms acting as gatekeepers and repeated leveraging of a dominant position onto related markets. Due to the characteristics of certain undertakings and the markets in which they operate (see below), there is a risk that ex-post application of existing competition instruments may is not be fast enough to address these scenarios.
- situations of tacit collusion in oligopolistic markets. Although tacit collusion is covered in theory by article 102 TFEU, it is almost impossible to distinguish the abusive conduct from the collective dominant position itself. This prevents effective application of the article to tacit collusion.

Potential scope of application

The structural competition problems mentioned above potentially have a broader scope than digital platforms with gatekeeper positions only. In the opinion of the ACM the NCT should therefore have a broader scope and be applicable to markets with the following features:

- Direct and indirect network effects in combination with enormous economies of scale (which increase the risk of tipping of a market);
- Economies of scope and learning effects (for example a large customer base or significant data accumulation could make it much easier for an undertaking to leverage its market power from one market to another related market).
- Endogenous sunk costs (for example as a result of large marketing expenditure or R&D costs). This may result in high entry barriers.

Although the current provisions on abuse of dominance provide for ex post intervention, for some of the other structural competition problems mentioned by the European Commission in the questionnaire (such as anti-competitive monopolisation), it usually takes a lot of time and effort to

identify the relevant markets, to assess dominance and determine the (potential) anti-competitive effects. Therefore in markets with the criteria mentioned above there is a risk that intervention on the basis of article 102 TFEU is not fast enough to prevent harm to competition.

Threshold for intervention

The ACM is of the opinion that the use of the concept of dominance as basis for intervention has clear advantages because it is an established criterion and it provides a clear threshold above which certain behaviour can be considered anti-competitive. The ACM, however, recognises that certain situations that do require an intervention may not be covered by the dominance criterion. In these situations, applying a threshold different from dominance would require a thorough view on which behaviour can be considered anti-competitive per se and cannot be justified by efficiency considerations. The ACM thinks that limiting the scope of the new competition tool to markets with the characteristics mentioned above might help to define a threshold for intervention. This is because the characteristics of the markets may be the driver of the structural competition problems. An example of a possible threshold for intervention other than dominance can be found in the UK where they use the notion of “adverse effect on competition” for market investigations.

Proportionate remedies

The NCT should provide possibilities to accept and impose proportionate remedies to structural competition problems. The remedies must always be aimed at solving structural competition problems. The proportionality principle should ensure that the most appropriate remedy is imposed to address the competition problem and that remedies are not wider than strictly necessary to address the problem. This principle also allows that more intrusive remedies can be imposed in cases where the competition problems are bigger. In principle both structural and non-structural remedies should be possible under the NCT. The ACM thinks that a non-exhaustive list of examples of possible and proportionate remedies under the NCT will avoid lengthy discussions on whether certain types of remedies can be imposed on the basis of the NCT. Such a list can also include “no regret remedies” which prevent certain behaviour that can be considered anti-competitive per se and has no efficiency justifications.

Relation between the Digital Services Act and the NCT consultation

The ACM sees a clear need for an ex ante instrument that addresses possible competition problems in relation to digital platforms with gatekeeper positions. Where it is clear that certain potential behaviour of digital platforms with gatekeeper positions is anti-competitive and has no efficiency justifications such behaviour should be subject to obligations and prohibitions in an additional ex ante regulatory framework as proposed in the Digital Services Act consultation. The ACM foresees that such a framework should also include the possibility of imposing tailored remedies on a case by case basis. The ACM is of the opinion however that the possibility of imposing tailored remedies on digital platforms with gatekeeper positions can be implemented in the DSA but can also be an important element of the New Competition Tool.

One way to achieve this could be a combination of i) additional regulatory framework imposing obligations and prohibitions that are generally applicable to all online platforms with gatekeeper

power and ii) New Competition Tool allowing to address structural risks and lack of competition in (digital) markets on a case-by-case basis. These instruments should be available at EU and national level as is the case with the existing competition instruments.

Any overlap between the two instruments should be managed by clear priority rules which apply in situations where the NCT and specific ex ante rules can both be applicable to a certain situation and between authorities at EU and national level. These rules should ensure that the most efficient and effective instruments are chosen in advance, but should not lead to an ex ante exclusion of the use of the NCT in certain sectors or markets.