**European Commission Consultation on New Competition Tool**

**Response of Euclid Law Limited**

Euclid submits this response to the Commission's consultation on the New Competition Tool in our capacity as lawyers qualified in the UK and Member States with significant expertise in advising clients on EU and UK competition law. Our views also draw on personal experience of enforcing the UK competition regime gained by members of the firm while working for the UK Competition and Markets Authority and its predecessor, the Office of Fair Trading. Our hope is that this experience can provide useful pointers that may assist the Commission in the design of a new competition tool. We consent to publication of this response in its entirety.

For the purposes of classifying our response, Euclid Law is a boutique law firm with offices in London and Brussels and fewer than 10 employees. The views set out in this response do not necessarily represent the views of our clients.

**Justification for a New Competition Tool**

Based on our experience of the operation of the UK market investigations regime, we agree that a new tool that goes beyond the options currently available to the Commission under Articles 101 and 102 TFEU, and that enables the Commission to identify and tackle structural market issues, is likely to be a useful addition to the EU competition regime. As far as jurisdictional scope is concerned, however, while digital markets may be particularly prone to structural issues, and the need for rapid action may be greater, there is nothing inherently novel or 'digital' in the desirability of a 'backstop' regime that empowers an authority to take specific action if harms arise for which traditional antitrust tools are insufficient. UK experience has demonstrated that, as well as being helpful for tackling issues in potentially oligopolistic markets (such as groceries or audit), such a tool can be valuable where markets are not functioning well due to wider factors, including the interplay with regulatory regimes (for example, rolling stock leasing, energy or private health care) or past government decisions (for example, airports). Each case will turn on its facts, however, justifying the need to individual assessments, within a clearly defined legal framework.

**Tool Options**

The Commission's Inception Impact Assessment sets out four options for any new tool, i.e. (1) a dominance-based tool with horizontal scope; (2) a dominance-based tool with limited scope; (3) a market structure-based tool with a horizonal scope ; and (4) a market structure-based tool with limited scope.

Adopting a dominance-based approach would lead to significant overlap between the new tool and Article 102. This would inevitably import key aspects of the latter regime that are sometimes raised as limiting its utility to tackle just those situations for which a new tool is proposed, including the need to define a relevant market and prove that one or more market participants are dominant on that market before any remedial action could be taken. This would be contrary to the Commission's apparent intention to use the new tool to tackle 'gap' cases "that cannot be tackled under the EU competition rules".

In addition, remedies would presumably only be addressable to dominant undertakings themselves, even if the actions of non-dominant undertakings also contribute to the dysfunctional nature of the market in question. Such an approach would also remove any ability to take action against undertakings that were not yet dominant but risked becoming so, due to particular market characteristics. Furthermore, creating a new tool that differed from Article 102 primarily by its absence of any requirement to prove a specified abuse (albeit without the ability to impose fines) could create an undesirable incentive for the Commission to use the tool to tackle unilateral conduct by dominant undertakings that should more properly be addressed under Article 102, with its attendant rights of defence and appeal, as well as greater precedent value.

Adopting either option 1 or 2 would thus fundamentally reduce the value of any such new tool and risk undermining the Article 102 regime.

Any market structure-based tool should have horizontal scope, rather than be limited in advance to defined sectors, such as digital markets. UK experience has shown that, while digital markets do tend to raise particularly challenging issues, as noted above market structure issues may also arise in a wide range of traditional markets, such as beer, aggregates, airports, consumer lending and insurance. Although the spread of digital business models may raise new discrete issues, such as how to analyse the impact of most favoured nation clauses on the online sale of motor insurance contracts, these need to be analysed in the context of the wider markets in which they arise. Limiting application of any new tool to defined sectors would significantly reduce its flexibility and utility, as well as creating a risk of disputes over the boundaries of the Commission's jurisdiction in individual cases. Adopting a hybrid approach, whereby the tool could only be applied in sectors that displayed structural issues and only in a specific case after particular structural issues had been identified would also create an unnecessary double hurdle for the Commission. It would be far better to create a flexible tool that empowered the Commission to investigate, and where justified take action, in any market where structural concerns were identified.

Were the Commission to proceed with creating a new tool, we would therefore strongly favour option 3.

**Regime design**

It is desirable that any new tool would be applied to address identifiable issues with current market structure, rather than potential 'risks' or 'threats' for future competition. Otherwise, there is a risk of creating a mandate for speculative fishing expeditions, where Commission officials would essentially be second-guessing how a market will develop in future, versus the views of market participants.

As well as leading to an unacceptable degree of uncertainty, creating a new regime that gave the Commission open-ended jurisdiction to review, and where need be challenge, unilateral business practices by non-dominant companies on currently well-functioning markets purely on the basis of potential *future* harm to market structure would also represent an unwarranted and disproportionate interference in businesses' freedom to operate.

It is important that the Commission maintains a competition-based test for intervention, to avoid creating an all-purpose policy tool that could be used by the Commission to take unilateral action on a

range of wider policy issues that should more properly be addressed (with the attendant scrutiny) through EU legislation or, indeed, by action at Member State level. As well as raising questions over compatibility with the Treaties, including on subsidiarity grounds, such an outcome would taint the framework and predictability of the European competition regime itself. The EU antitrust regime is one of the crown jewels of the European project and the Commission should not risk any harm to it through the creation of a new tool, however good the intention. While there is no suggestion that the Commission anticipates using any new tool in this way, such an outcome should be prevented at the outset, most importantly by maintaining a tightly defined competition focus.

Any such competition test should nevertheless not be too narrowly focused on addressing only issues of market structure, provided that a valid competition concern can be identified. While many market failures may be caused by issues with the market structure, for example barriers to entry or expansion, UK experience is that concerns may extend beyond what are traditionally viewed as structural issues, extending for example to concerns over information asymmetry, lack of consumer engagement or behavioural biases. The UK test, which is based on identifying 'features of a market' that may prevent, restrict or distort competition, has proved itself to be sufficiently flexible to capture issues of concern, without straying too far into policy areas more appropriately addressed by Government and Parliament.

UK experience suggests that the Commission should implement a preliminary screening process, to undertake a degree of market analysis to assess the scope and severity of structural concerns, before opening a full-scale investigation with remedy powers. This could be achieved by creating a discrete 'phase 1' process, similar to the UK market study regime, or through use of existing sector inquiry procedures, albeit to an accelerated timetable.

It should remain possible at the end of such an initial stage, or indeed at the end of a full investigation, for the Commission to decide that there are no concerns or that any remedies would be disproportionate to any issues identified. To help the Commission team maintain an open mind on outcomes and avoid confirmation bias, a degree of separation between phase 1 and phase 2 decision makers is also desirable. While this may not be straightforward in a system based on collective decision making by the College, we would recommend that thought be given to the question of how best to maintain fairness, transparency and accountability in decision-making at an early stage of regime design.

Given the wider focus of UK market investigations, the CMA typically deploys large teams that include financial analysts and statisticians, as well as lawyers and economists. The Commission should ideally ensure that it would have access to a similar breadth of expertise, without having to rely unduly on outside consultants.

**Procedural implications**

Although any such tool would not enable the Commission to impose fines, or create a right of action for third party damages claims, market-based remedies may ultimately have an even greater impact on a company's business model or, in the case of structural remedies, property rights. Any such remedies would be imposed in a situation where the affected company had done nothing wrong, in that it had not engaged in conduct which was likely to infringe competition law prohibitions and hence be unlawful.

In such circumstances, and especially where structural remedies are imposed, it is crucial that undertakings enjoy full rights of defence, including rights of appeal to the General Court on legal and procedural points. While such appeals need not necessarily involve a 'full merits' re-hearing of the facts, and there may need to be a higher margin of discretion than in antitrust cases, the new regime must still be administrable and justiciable, with the prospect of prompt redress. It is notable in this context that, while it does not the EU access to file model, the UK markets regime is characterised by a high degree of procedural transparency and parties have the ability to seek redress through a detailed - and where needed rapid - review by the specialist Competition Appeal Tribunal.

We would suggest any new tool should be used sparingly, where an issue is revealed that cannot be readily addressed by Article 101 or 102 TFEU, which remain broadly effective and powerful instruments for tackling most forms of anticompetitive conduct. The Commission should thus be required to undertake an initial assessment, before opening a full investigation under the new tool, to confirm that the potential concerns it has identified cannot be adequately addressed by Article 101 or 102.

**Remedies**

UK experience has shown that getting remedies right is the most important aspect of a markets regime. Remedies that are overly prescriptive, such as price caps, risk creating new distortions and dampening competitive incentives, while lighter touch remedies, such as mandating information provision to consumers, may be ineffective or contribute to problems (such as consumer inaction) that they are intended to resolve. Getting the remedy right thus requires a high degree of understanding of the specific markets under investigation, including where appropriate appreciating any differences in local context.

Market remedies essentially create small scale sectoral regulation regimes that need to be implemented, monitored and revised over time. Although the Commission has demonstrated an ability to undertake detailed follow-up reviews in the context of sector inquiries,[1] widespread regulatory enforcement may be more suited to national sectoral regulators or consumer protection bodies than the Commission. This raises wider constitutional questions over the balance to be struck between the Commission and Member States and in any event demonstrates a need for close coordination with national regulators going well beyond the current Advisory Committee process for antitrust cases.

As others have noted, remedy design is "complex and it is easy to get it wrong".[2] Without prejudging outcomes, it is important that the potential for effective remedies is considered as a matter of principle at the outset. Remedy design is also an area where close involvement of sectoral regulators has proved to be beneficial in the UK context.

[1] Notably, in pharmaceuticals and business insurance.
[2] See Amelia Fletcher, *Markets Investigations for Digital Platforms: Panacea or Complement?* 6 August 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668289.

It is also important that remedies do not run counter to the principle underpinning Article 2 Regulation 1/2003, notably that an agreement that complies with Article 101 TFEU should not be rendered unenforceable by action under the new tool.[3]

**Conclusion**

We trust that the above points are helpful to the Commission and look forward to engaging in further consultations, as the Commission's policy takes shape.

**Euclid Law Limited**
**8 September 2020**

[3] Cf footnote 5 of *CC3 (Revised) – Guidelines for market investigations*.