

EX ANTE REGULATORY INSTRUMENT FOR LARGE ONLINE PLATFORMS AND A NEW COMPETITION TOOL

Response of Federation of German Consumer Organisations (vzbv) to the public consultation on the “New Competition Tool” and the Digital Services Act package “Ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union’s internal market”

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I. SUMMARY

This paper provides the Federation of German Consumer Organisations' (Verbraucherzentrale Bundesverband - vzbv) feedback to the European Commission's initiative on (1) the "Digital Services Act package: an ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union's Internal Market" ("Ex Ante Regulation") and (2) a "New Competition Tool" ("NCT").

The challenges to fair competition and a functioning single market posed particularly by large platform players in digital markets require new instruments to complement traditional enforcement of competition in order to ensure a functioning single market and protect consumers' interests in an effective and timely manner.

Both tools, the Ex Ante Regulation and the NCT should be designed to complement each other: A combination of a list of prohibitions/restrictions and obligations in the Ex Ante Regulation included in the DSA, complemented by a case-by-case assessment and remedies in the context of the NCT.

Digital Services Act (DSA) Ex Ante Regulation

- vzbv supports the introduction of an asymmetric Ex Ante Regulation for large online platforms with significant network effects acting as gatekeepers.
- The Ex Ante Regulation should be based on a **list of prohibitions/restrictions** and targeted **obligations**. The comprised list should define comprehensive, enforceable prohibitions and obligations for large online platforms acting as gatekeepers and it should be regularly reviewed. This list could be complemented by case-by-case analysis and remedies/obligations where necessary under the NCT or through enforcement of Articles 101 and 102 TFEU.
- vzbv supports the creation of a **taskforce within the European Commission's** Directorate-General for Competition. It should be responsible for enforcement of the Ex Ante Regulation (and the NCT) in close cooperation with the sectoral competent authorities at EU and Member State level.

New Competition Tool (NCT)

- vzbv supports the introduction of the **NCT** to deal with **specific cases** of **structural risk for competition** in markets. The NCT should be designed as a market structure-based competition tool with a horizontal scope.
- To ensure effective enforcement of the NCT, the European Commission must be vested with appropriate **powers to investigate** and to **impose** and **enforce** effective **remedies**.
- The NCT should be clearly **delimited from competition policy enforcement** under Articles 101 and 102 TFEU.

II. INTRODUCTION

The Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband - vzbv) welcomes the opportunity to respond to two European Commission consultations on (1) the “Digital Services Act package: an ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union’s Internal Market” (“Ex Ante Regulation”) and (2) a “New Competition Tool” (“NCT”).

vzbv supports the proposal of the European Commission to introduce an Ex Ante Regulation for large online platforms with significant network effects acting as gatekeepers as envisaged in the Digital Services Act package. An Ex Ante Regulation is a suitable tool to remedy the challenges to social and economic welfare posed by large gatekeeper platforms.

vzbv also supports the proposal of the European Commission to introduce the NCT, enabling the Directorate-General for Competition (DG COMP), in close cooperation with Member States’ competition authorities, to intervene proactively in digital and non-digital markets. The envisaged NCT must provide an adequate response against structural competition distortions resulting from increasing digitalisation and “platformisation” of markets.

Both tools, the Ex Ante Regulation and the NCT should be introduced and designed to complement each other and the existing competition policy enforcement framework.

1. URGENCY FOR NCT AND EX ANTE REGULATION

Large **gatekeeper platforms** increasingly determine how consumer markets function. Some markets have become increasingly concentrated with a few large platforms acting as gatekeepers for many digital products and services accessed by consumers. While digital innovations increased consumer welfare over the past decades, these welfare gains become threatened in more recent times through excessive market concentration by gatekeepers for many digital products and services – especially if gatekeepers act across markets.

The reasons are underlying market characteristics that support and cement large platforms’ market positions: lock-in and network effects, economies of scope and scale, as well as information asymmetries. Some online platforms have repeatedly been engaged in certain types of conduct (like self-preferencing, tying and bundling) and have thus reinforced this trend. This is facilitated as gatekeepers occupy central positions in a market or across markets – enabling them to set the rules of the game for suppliers and consumers alike, thereby acting in their own commercial interest.

As a result, it becomes more and more difficult to ensure that digital markets remain fair and contestable for innovators, businesses, and new market entrants. This trend threatens to undermine the gains in consumer and social welfare that were generated by the digitised economy so far. This unfavourable development calls for policy-makers to take decisive actions at European level.

Considering the interplay of technology, data and economic power and the ability of platforms to leverage them across markets, the current European competition legislation is insufficient to address the challenges posed by gatekeeper platforms.

Some platform **players, acting across markets** occupy central positions in markets, (or “interfaces” between markets) connecting adjunct markets. This enables them to

determine the rules of the game for suppliers and consumers alike, acting in their own commercial interest. The control of ecosystems or of “interfaces” also allows **non-dominant players to control** suppliers’ access to **significant market segments**. This enables also non-dominant players to set the rules by which supply and demand meet in these markets.

As a result, it becomes more and more difficult for competition authorities to ensure that digital markets remain fair and contestable for innovators and new market entrants.

There is the notion that the **effectiveness** of remedies in digital market cases solely through the **enforcement of competition law as it currently stands is too limited**. Although the enforcement of competition law has sanctioned and imposed remedies in individual cases, this has taken many years during which the harm to competition and consumers has persisted and sometimes increased. Also, the effectiveness of remedies in digital market cases can be doubted. Competition cases and multiple international studies¹ have identified wide ranging and self-reinforcing harms to competition in digital and related markets, hampering the ability of these markets to self-correct. Therefore, the European Commission should introduce new measures that can help to prevent, rather than belatedly attempt to cure, the resulting harms to competition, to the single market and to consumers.

Considering the interplay of technology, (consumers’) data, economic power and the ability of platforms to leverage these across markets, the current European competition framework is not sufficient to address the challenges posed by large (multi-market) digital players. National policymakers, for example in Germany and France, have recognised this and initiated legislative reforms to enable their national competition authorities to effectively and proactively intervene in digital markets, e.g. to prevent them from “tipping”. The European Commission should follow this approach and use the NCT to initiate a corresponding “update” of EU competition rules and introduce the Ex Ante Regulation to set general rules for large gatekeeper platforms that help tackle market-wide problems.

III. A COMPLEMENTARY POLICY APPROACH FOR EX ANTE REGULATION AND NCT

The European Commission should design the Ex Ante Regulation and the NCT in a complementary manner:

- a) A mix of **general prohibitions/restrictions** of certain unfair trading practices and targeted **obligations** for large online platforms acting as **gatekeepers** under the proposed **Ex Ante Regulation** envisaged in the DSA to tackle general problems.
- b) **Specific** tailor-made **remedies** for large gatekeeper platforms on a **case-by-case** basis under the **NCT** to tackle **structural competition problems**.

¹ Including most recently, the in-depth analysis of digital advertising markets by the UK CMA - Online Platforms and Digital Advertising Market Study, 1 July 2020, <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>.

Both, the Ex Ante Regulation and the NCT must also be complementary to the

- c) Existing **enforcement of Articles 101 and 102 TFEU** of anticompetitive conduct.

The European Commission should complement “traditional” competition policy enforcement under Articles 101 and 102 TFEU with the NCT tackling case-specific structural problems (outside of the realm of Articles 101 and 102 TFEU) and an Ex Ante Regulation with general prohibitions/restrictions of certain practices and targeted obligations for large gatekeepers. This triple approach would create a legal and enforcement framework capable of addressing the blind spots of the current enforcement of competition law and set the conditions for consumer welfare to thrive in the digital economy and other markets (see Figure 1 below).

vzbv emphasises that there should be no friction between the ex-ante rules and the NCT and that they should complement each other’s role in ensuring that markets are open, competitive and fair. Also, law makers must clearly distinguish between the enforcement of Articles 101 and 102 TFEU and the enforcement of the NCT.

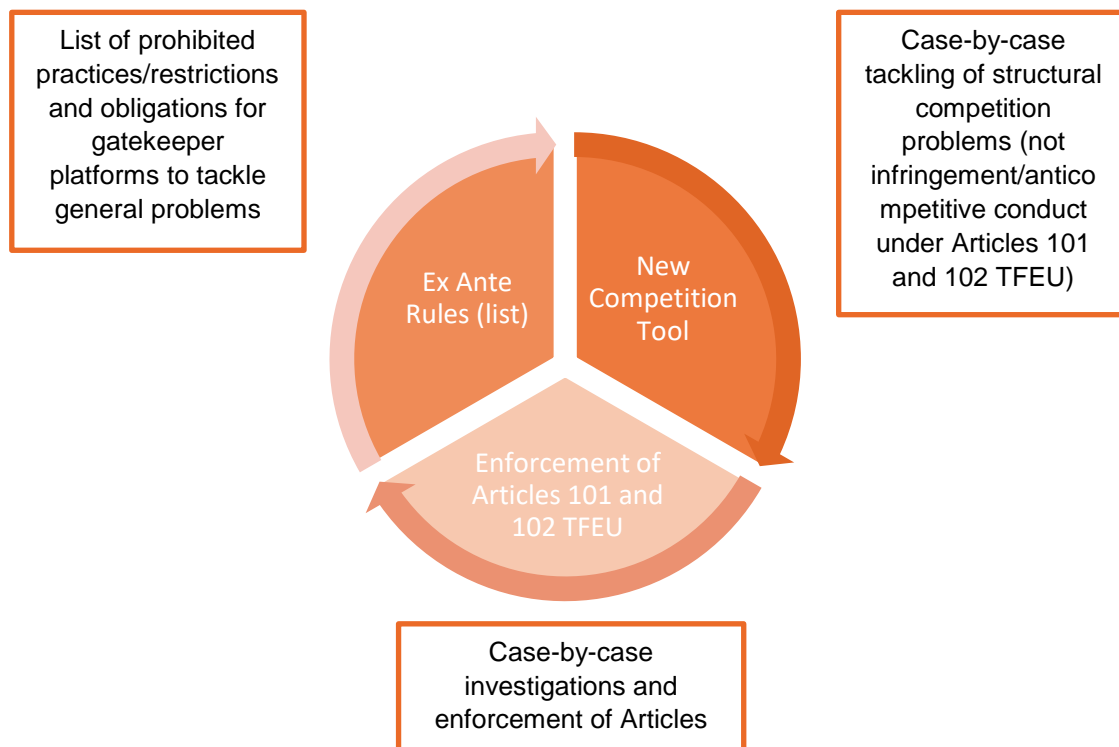


Figure 1: Complementary Policy Approach: Ex Ante Regulation, New Competition Tool and enforcement of Articles 101 and 102 TFEU.

1.1 Combining the Strength of Case-by-Case and “Blacklist”-based Approaches

Adopting an enforcement mechanism for individual cases arising from structural competition problems (under the **NCT**) has the advantage of being flexible and enables **case-specific remedies**. However, its downside is that it can take an unacceptably long time, while harm to competition and consumers persists.

The **list-based** approach in the Ex Ante Regulation of **prohibiting** or restricting certain unfair trading practices in general and imposing targeted **obligations** on large gatekeeper platforms has the advantage of **signalling to market participants** which

conduct is deemed illegal, thereby deterring unfair practices. It also **facilitates monitoring** and **fast enforcement**. Its downside is the challenge to formulate prohibitions or restrictions of unfair trading practices and obligations. If the wording of the prohibited practices is too specific, they may be too narrowly defined, and platforms will be likely to claim successfully that their conduct falls out of the scope of the rule. As a result, attempts to take action against these unfair practices will be chronically unsuccessful. An EU-wide list-based approach, prohibiting or restricting certain unfair trading practices and by large gatekeeper platforms can be introduced relatively quickly.

The combination of both complementary policy approaches will enable the EU Commission to realise the desired policy objectives of both initiatives in the most effective manner.

IV. DSA EX ANTE REGULATION

This section will lay out the desired key principles that should be underlying the Ex Ante Regulation, the criteria that could be used to identify gatekeeper positions and suggestions for conducts to be included in the lists of prohibited/restricted practices and obligations.

1. KEY UNDERLYING PRINCIPLES AND SCOPE OF THE EX ANTE REGULATION

The key principles underlying the design of the Ex Ante Regulation should include:

- **EU level approach:** The European Commission must **avoid fragmentation** of the single market through inconsistent rules or inconsistent enforcement of the Ex Ante Regulation. This is necessary to ensure the effective functioning of the digital single market in the interest of innovative businesses and consumers. However, enforcement must not necessarily take place at EU level, though consistent enforcement of the rules must be achieved. Existing enforcement standards at national level should not be weakened.
- **Asymmetric regulation:** vzbv supports the introduction of an asymmetric Ex Ante Regulation specifically targeting large gatekeeper platforms. The Ex Ante Regulation should therefore not apply to other platforms or companies, in order not to hamper their ability to compete with the gatekeeper platforms. As a result, the Ex Ante Regulation should provide strong incentives for all market participants to innovate and offer better products at more attractive conditions to consumers.
- **Rules covering all sectors:** When implementing The Ex Ante Regulation the European Commission should adopt a regulatory approach based on clear obligations for platforms and prohibition or restrictions of unfair conduct. Large platforms increasingly act across markets and sectors. As they leverage data as well as access to consumers and suppliers across markets, a general "blacklist"- and obligations-based approach seems appropriate as it would cover all sectors. Otherwise, there is a risk that gatekeeper platforms' activities across markets will significantly hurt consumers and competitors in sectors not covered by the Ex Ante Regulation. These general Ex Ante Regulation could be

complemented by **sector- or issue-specific rules** e.g. for advertising, operating systems and app-stores.

- The success of a policy approach based on an obligation/prohibition list depends on defining an **unambiguous list** of types of conduct which are **broad** enough in scope to catch all relevant conduct, but which is sufficiently **precise** to have the desired **signalling effect** to market participants and enable **simple monitoring** and **enforcement**. The challenge is to strike a balance between specificity and broadness: If the wording of the prohibited practices is too specific, they may be too narrowly defined, and platforms will be likely to claim successfully that their conduct falls out of the scope of the prohibited practice. As a result, attempts to take action against these unfair practices will be chronically unsuccessful. An EU-wide list, prohibiting or restricting certain unfair trading practices by large gatekeeper platforms can be introduced relatively quickly.
- **Data protection (GDPR) principles** must be taken into account and enforcers must be involved in the establishment of obligations and prohibitions to ensure that consumers fundamental rights to privacy and data protection are respected at all times in the investigation of the business practices.
- For legal certainty and to avoid potential forum shopping it will be important to ensure clear **delimitation** and **consistency** of the concurrently proposed **New Competition Tool** both in scope of application and enforcement.

2. CRITERIA TO IDENTIFY A GATEKEEPER POSITION

The criteria should be used to identify a gatekeeper position for particular products/services or particular markets (e.g. the gatekeepers' core and adjacent markets). These criteria do **not necessarily have to be cumulative** in each case. The list of criteria must be reviewed regularly in order to ensure that the criteria reflect current market realities.

The following factors seem particularly relevant:

- Ability to exploit **network effects**.
- Ability to build and exploit "**economies of scope**" by combining various resources (e.g. data and access to users from different products/services, domains or markets/sectors).
- Ability to control access and **determine conditions** for **consumers'** access to a **significant part** of a **market**. (e.g. expressed in the ability to engage in tying and bundling of services and/or terms and conditions vis-à-vis consumers or business users.)
- **Number of users** and **market share**.
- Large scale **accumulation** of **data relevant for a competitive advantage**, leading to significant **barriers to entry**.
- Platforms in **markets characterised by** high and non-transitory **barriers to entry**.
- Exceptional ability to **leverage assets** (e.g. data) from one market to another.

- **Lock-in effects** on (business) users and consumers, the inability of consumers to multi-home and the presence of high **switching-costs** for consumers (i.e. costs for consumers associated with substituting the service/product/provider). (Degree of) **Availability** of an **equivalent substitute** for the service/product/provider.
- **Asymmetrical bargaining power** vis-a-vis **business partners**/competitors. E.g. the ability to control access and determine conditions for market participants of an ecosystem.
- Exceptional **financial power** or access to **other resources**.
- **Vertical integration** or activities on other related markets.

3. EX ANTE REGULATION: LISTS OF PROHIBITIONS/RESTRICTIONS AND OBLIGATIONS

In the following, vzbv proposes practises of gatekeeper platforms to be included in the **lists of prohibited** or restricted **practices** and **obligations**. The European Commission should consider supplementing the lists of prohibited practices and obligations with **additional guidance notices**. In order to ensure that the Ex Ante Regulation reflects current market characteristics and business practices it is essential that the European Commission **regularly reviews** and **updates** this list.

3.1 Prohibited/Restricted Practices

The following practices should be considered for inclusion in the list of prohibited/restricted practices:

- Prohibition of **self-preferencing** of own or linked services/products (e.g. in ad tech and search). This could be based on examples like access regulation and its non-discrimination principles developed for telecoms markets and then adapted to digital markets.
- Prohibition of **restrictions of data portability** beyond the GDPR.
- **Deliberate product/service degradation** on specific services channels in order to force consumers to agree to terms and conditions/install applications on their devices. E.g. deliberately reduced functionality of a map service on mobile phones web browsers in order to force consumers to install the platforms app (while the service fully functions with standard web browsers).
- Restrictions on **using/integrating consumer data** obtained from **different branches of a conglomerate** firm or through different services (for example where data has been collected through the leveraging of market power).
- Prohibition of practices of **tying and bundling**: In cases when gatekeepers sell a good or grant access to a service on the condition that the consumer uses/purchases a different service/product or agrees to terms and conditions that could be viewed as separate but are tied ("sold") together as a bundle. This includes cases where consumers want to get access to service and have to agree to use/install a different service or accept terms and conditions allowing the firm to collect and analyse more consumer data.

- Restrictions on **gathering and/or use of data by gatekeepers** from their business users to gain competitive advantage (to the extent necessary beyond the P2B Regulation).
- Restrictions on the use of **pre-installation and defaults** (in particular for browsers and search engines) and of other **nudging techniques**: imposing a “fairness-by-design” duty on gatekeepers to ensure that they make it as easy as possible for consumers to make genuine choices (rather than as presently, exploiting recognised consumer behavioural biases to channel/manipulate consumer choices and lock-in consumers).
- Restrictions on the exercise of **bargaining power** vis-a-vis trading partners in specified areas (to preclude discrimination, forced data sharing/withholding of data, unfair terms and conditions in relation to, for example, payment terms, liability, rights assignments) and, where relevant, to preclude gatekeepers’ use of unfair commercial practices vis-à-vis consumers.

3.2 Ex Ante Regulation: Targeted Obligations

Obligations could be included where they can complement the prohibited/restricted practises set out above. These could include:

- Obligations to report specified **relevant information** to the EU Online **Platform Observatory** or the “**Taskforce**” (see next chapter) on particular activities on a regular basis.
- Obligation to support full effective **data portability** by consumers, including automated transfer of data to competitors upon consumers’ request.

4. NEW EU TASKFORCE: ENFORCEMENT OF EX ANTE REGULATION AND NCT

Large gatekeeper platforms can take the form of conglomerate companies whose business activities fall under the competence of different regulatory and supervisory authorities at the Member State and EU levels. But nonetheless, some recently emerged digital services, posing significant challenges/risks for consumer welfare and competition alike, are not explicitly regulated or supervised by any specific competent authority. That holds for example for the “multi-purpose technology” of smart digital assistants. Another important factor for the enforcement of the Ex Ante Regulation is that many of the large players concerned are typically active in different Member States. This fact, however, does not automatically require the creation of a new competent authority. Instead, vzbv proposes to evaluate the idea of establishing a new Taskforce led by DG COMP to enforce the Ex Ante Regulation and the NCT.

4.1 EU Taskforce: Enforcement of Ex Ante Regulation and NCT

The primary principles underlying the proposed **Ex Ante Regulation** are competition related. Therefore, **monitoring** and **enforcement** could be performed by a new “Taskforce” led by **DG COMP**. At the same time, the **Taskforce** should also be responsible for the application of the **case-by-case remedies** envisaged in the **NCT** (see chapter on NCT below).

Depending on the specific issue at hand, the Taskforce should work in close **cooperation** with **other Directorates-General²**, the **data protection authorities** as well as **national enforcement bodies**. Given the inherent cross-border nature of platform conduct, the European Commission's Taskforce would take any necessary enforcement decisions with respect to the listed infringements of obligations or prohibitions under the DSA Ex Ante Regulation, unless another authority was better placed to do so in a particular case.

In enforcing the rules of the Ex Ante Regulation, the Taskforce could take account of infringements of the list of prohibited/restricted practises, unfair trading practices and competition-related issues not directly addressed by DG COMP under classic competition policy (e.g. cases enforced under Article 101 and 102 TFEU).

4.2 Benefits of the EU-level Taskforce Approach

Putting a Taskforce in place at EU level responsible for the enforcement of the Ex Ante Regulation and the NCT has several benefits:

- Due to its double role, the Taskforce is suited to **avoid inconsistencies** of application and enforcement **between the Ex Ante Regulation and the NCT**. This approach also maximises synergies by using NCT-findings to update the Ex Ante Regulation, making sure it reflects current market and business realities (e.g. in identifying gatekeepers subject to regulation and updating the list of prohibited practices).
- The risk of **inconsistencies at Member State level enforcement** and subsequent legal uncertainty would be **avoided**, while at the same time drawing on Member States competent authorities' expertise in specific cases/markets/issues.
- **No major and lengthy** (and thus harmful) **institutional set up** would be required to start enforcement, as the Taskforce could be put in place in a short timeframe.
- The Taskforce could call on **existing experienced staff** and could be operational immediately.
- **Forum shopping** by platforms would be prevented and **maximum regulatory independence** would be ensured.
- **DG COMP** is highly **experienced** in the types of **procedures and processes** required for analysis and enforcement of competition-related policies, including interim measures, evidentiary standards and respect for due process.
- The European Commission is best placed to easily facilitate **EU-wide cooperation** among the involved **Member States authorities** and **with extra-EU jurisdictions**, as large platform players often originate from outside the EU.

² e.g. Directorate-General for Communications Networks, Content and Technology (DG CONNECT), Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), the Directorate-General for Justice and Consumers (DG JUST)

It would be essential for the Taskforce to be vested with appropriate **legal powers** (e.g. for carrying out investigation and enforcement) and endowed with sufficient **financial, human and technical resources** to carry out this new task.

V. THE NEW COMPETITION TOOL

DG Competition should be endowed with the legal powers and tools to deal with structural competition issues. Among others, these must include carrying out market investigations and impose appropriate remedies, even in the absence of a dominant single player. Therefore, vzbv proposes a market structure-based NCT with a horizontal scope. It should allow the European Commission to impose behavioral and, where appropriate, structural remedies to improve the functioning of markets to the benefit of consumers and other market actors, independently of the finding of an infringement of Article 101 or 102 TFEU.

1. SCOPE OF THE NEW COMPETITION TOOL

vzbv holds that the scope of the NCT should be rather broad in order to fulfil the policy goals of the two initiatives.

1.1 Horizontal Approach more suitable than limited Scope

The European Commission should design the NCT with a **horizontal approach** instead of a limited scope. Although today many of the severe limitations of competition rules and enforcement are found in digital markets, limiting the NCT's scope would not seem appropriate. The main reason is that the lines between **digital and "traditional" non-digital markets are blurring** and it can't be predicted which sectors will raise structural concerns in the future. Also, the power of competition law results from its universality: It is applicable to all sectors and areas of economic life. That principle must not be given up.

Adopting the NCT with a horizontal scope does not mean it must be applied in all sectors at present but it would make the NCT future proof if fair competition in further markets would be undermined by the structural problems the NCT aims to address.

1.2 Market Structure-based Approach more suitable than Dominance-based Approach

The current European competition legislation does not allow for addressing some specific new structural challenges to competition. These include **monopolisation strategies by non-dominant platforms** with market power or parallel leveraging strategies by platform-players into multiple adjacent markets. If a significant part of a digital market is controlled by a strong platform, this must not necessarily be a "classic" dominant firm. The control of ecosystems or of central strategic positions in markets (or "interfaces" between markets) allows non-dominant players to control suppliers' access to significant segments of consumers and vice versa. This enables also non-dominant players to set the rules by which supply and demand meet in these markets. This ability of non-dominant players to set the rules raises serious competition concerns, especially with respect to fairness of conditions (towards consumers and third-party suppliers), self-preferencing and deception of consumers.

Furthermore, **if the NCT** were to be **dominance-based** this would suggest a potentially significant **overlap with Article 102** enforcement which should be avoided.

1.3 German Competition Law: A Blueprint for the NCT?

To address these problems, the draft law to reform the German competition law³ tries to address the problem of platforms' with "overriding importance for competition across markets". § 19a of the current draft law of the amendment of the German competition law introduces a new form of platform power dubbed "overriding importance for competition across markets". This concept supplements the concepts of dominance and "relative market power" (which had been introduced into German competition law before). § 19a of the draft law is intended to enable the German competition authority (Bundeskartellamt) to remedy anti-competitive conduct of platform players occupying central strategic positions in multilateral markets or networks. vzbv welcomes this approach⁴ as it addresses one of the core problems for competition in digital platform markets and ecosystems.

It is clearly in the interest of consumers and competitors if competition authorities can take action against such platform players that exploit their key position in various markets to the detriment of consumers and competitors "without necessarily having already crossed the threshold of market dominance in all these markets".

2. COMPETENCES OF DG COMPETITION: ENFORCEMENT OF THE NCT

Naturally, DG COMP is the competent authority for enforcing the NCT as the NCT should be part of the EU Competition law. In particular, the NCT should be enforced by a new Taskforce, also responsible for enforcing the DSA's Ex Ante Regulation (see section above). This seems the most suited approach to avoid inconsistencies in the application and enforcement of the NCT and the Ex Ante Regulation.

To this end, DG COMP should be endowed with the same (or equivalent) set of investigative powers and procedural tools as for the enforcement of competition law under Article 101 and 102 TFEU (including interim measures, commitment decisions, structural/behavioural/hybrid remedies).

DG COMP should have the **competence to inform** and make **legislative recommendations**, in particular in relation to the **Ex Ante Regulation** (e.g. this could include the identification of gatekeepers and the content of the prohibitions and obligations list for the DSA Ex Ante Regulation).

The NCT should allow DG COMP to impose **fines** for procedural infringements or as penalty payments for failure to comply with the investigation or decisions and remedies.

DG COMP should have the **obligation to impose** appropriate **remedies** or other measures within legally binding deadlines. It should also be obliged to **consult** all relevant **market participants** (including consumer organisations) on the structural market **problems** identified and proposed **remedies** or other measures.

³ BMWI - Bundesministeriums für Wirtschaft und Energie, „Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz)“, 2020, S. 1–157 <https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf?__blob=publicationFile&v=10> [accessed 2 Juli 2020].

⁴ vzbv - Verbraucherzentrale Bundesverband, *Fairen Wettbewerb in digitalen Märkten sicherstellen - Stellungnahme des vzbv*, 2020 <<https://www.vzbv.de/dokument/fairen-wettbewerb-digitalen-maerkten-gewaehrleisten>>. [accessed 4. September 2020].

3. CASE-SPECIFIC REGULATORY INTERVENTIONS

The NCT should deal with case-by-case specific remedies. vzbv emphasis, that the **interventions** and **remedies** should be as **open as possible** in order to allow the competent authority as much **flexibility** as needed to deal with the peculiarities of each case.

The case-by-case remedies dealt within the context of the NCT should not be limited but applied in be flexible and open including **structural** and **behavioural remedies**. The remedies imposed could take inspiration from and should be consistent with Ex Ante Regulation (see above). Remedies could address the supply-side, e.g. by opening up monopolies or ecosystems or prevent markets from tipping. They could address the demand side problems, e.g. by targeting consumer behavioural biases and decision-making issues mentioned above. This could include information disclosure and presentational requirements to enable more self-determined decision-making and limit the exploitation of behavioural biases, facilitating consumer switching and protecting of consumers against unfair commercial practices. The effectiveness of consumer-facing remedies should be empirically verified.

Given the dynamic character, especially of digital markets, it is necessary to **regularly monitor** the **effectiveness** of the imposed **remedies**. This allows the remedies to be refined if proven ineffective or terminated if they no longer necessary.

Potential remedies could include:

- **Data separation within ecosystems or conglomerate companies**, including restrictions on usage/integration of consumer data obtained from different branches/services of a conglomerate company. For example where data has been collected through the leveraging of market power.
- **Data portability**, giving consumers control over data sharing and mobility (e.g. migrating data to another service).
- **Unbundling/untying of services and terms of conditions**, including in cases where consumers, in order to get access to a specific service, have to use/install a different service or accept terms and conditions allowing the firm to collect and analyse more consumer data than is necessary for the functioning of the service.
- Third parties' **access to data** where this is a barrier to entry (under strict adherence to the GDPR).
- Third parties' **access to other inputs/services** (under strict adherence to the GDPR).
- Prohibition/restrictions of **self-preferencing** of own services/products (e.g. in advertisement and specialised search).