

Committed to Europe

Orange views on the New Competition Tool and platform regulation proposal under the Digital Services Package

Executive summary

With our economy and society moving to digital and with the COVID crisis accelerating this trend, it is essential to ensure that the online world remains competitive and contestable. Online platforms have contributed positively to our society by offering goods and services in a convenient way that appeals significantly to consumers while also facilitating businesses' access to global markets.

However, the gatekeeper role that some large online platforms have acquired over the last +10 years has also led to certain substantial concerns, to the detriment of the European Union innovation and competitiveness, as well as consumers' choice. Those issues have been at the heart of the European Commission and National Competition Authorities' actions over the last years with several decisions tackling abusive behaviours of global digital players. Though those decisions have shown that the authorities can intervene and sanction certain illegal practices *ex post*, they have also demonstrated that competition enforcement may be challenging in a fast-moving digital economy.

Against this background, Orange considers that competition law is overall "fit for purpose" and there is no need to fundamentally modify it. However, to ensure fair competition within the online world, it is necessary to improve the current framework and develop new targeted intervention tools to efficiently tackle structural competition problems exerted by large digital platforms acting as gatekeepers.

To avoid regulatory overreach and legal uncertainty, Orange suggests the following approach:

- Clearly defining the issues at stake and the scope of the new targeted intervention – focusing solely on large digital platforms acting as gatekeepers
- Avoiding disproportionate actions such as the various options suggested under the Inception Impact Assessment on the New Competition Tool
- Implementing an *ex ante* regulation through a list of prohibited practices for large digital platforms acting as gatekeepers, enforced at European level
- Allowing a targeted intervention to impose tailor-made remedies (without establishing an infringement) to resolve identified structural competition problems exerted by large digital platforms acting as gatekeepers, through an extension of the European Commission, DG Competition, powers.

In details

A. The issues at stake and the scope of the intervention should be clearly defined for any new intervention to remain proportionate and justified

Structural competition problems encountered in the digital economy

Structural competition problems may arise in markets where large digital platforms operate and such concerns are due to the combination of different distinctive features of these actors providing a competitive advantage, impossible to replicate.

Structural competition problems allow the emergence of ecosystems and gatekeeper scenarios and may result in market tipping and/or monopolization. In these situations, the platform position becomes incontestable, while existing actors are eliminated or marginalized and significant entry barriers are created

discouraging any new entry. Also, structural competition concerns facilitate customer lock-in within an ecosystem resulting in a possibly abusive use of customer data and customers' extensive exposure to advertising and may *in fine* impact innovation and customer choice.

Structural competition problems concern practices such as tying/bundling, leveraging power from one market to another, imposing unfair business terms due to bargaining power imbalances, imposing "take it or leave it" conditions through retaliation measures, self-preferencing and discrimination, priority placements/pre-installation of applications, default settings distorting purchasing decisions, imposing *de facto* standards and abusive conditions on IP policy, creating obstacles for interoperability and for solutions allowing a sufficient level of open sources/APIs, imposing proprietary services, restricting/discriminating access to inputs critical to compete, etc.

Structural competition problems are due to specific features of some large digital platforms

When assessing a need for intervention, it is of utmost importance to clearly define the scope. On one side, **the definition of large digital platforms acting as gatekeepers should capture activities** such as operating systems, search/voice assistants, marketplaces/application stores, online advertising, content sharing and cloud services. Also, promising markets for the future should be looked at such as health, home security, entertainment, augmented reality, voice and image recognition, gaming, online payment, identity authentication, IoT and other products and services based on machine learning and artificial intelligence.

On the other side, **the definition should regroup the features specific to large digital platforms, and target only those acting as gatekeepers.**

Orange therefore proposes to define a large digital platform acting as a gatekeeper as a company operating a structural digital platform and fulfilling the three following mandatory cumulative criteria:

- Plays an unavoidable trading partner role by controlling the access to markets, services/inputs and/or users, or by significantly affecting the functioning of markets where it operates through exercise of influence on third parties' business activities
- Benefits from direct and indirect network effects through control of large user data base
- Has reached a critical scale which is not reasonably possible to replicate or challenge (based on conglomerate footprint, data, customer base but not only)

Those mandatory criteria could be analyzed using this non limitative list of characteristics:

- Benefits from strong economies of scale and scope due to low marginal costs, scale of data and network effects
- Majority of clients are single-homing
- Is integrated in an ecosystem which is maintained and reinforced through leveraging
- Has access to large amount of important data difficult to access or replicate within a reasonable timeframe
- If online advertising is directly or indirectly related to the platform, market shares in this market are high
- The company's financial value is high and/or has a strong financial capacity
- Third parties depend on the platform for their activity
- Business model is based on collecting, processing, editing and further monetizing data
- Is free of charge for consumers but monetized otherwise (advertising, data, etc.)
- Has powerful negotiation position creating bargaining power imbalances
- Consumer decision making is limited due to imposed default settings and conditions
- Competes with its own business users to supply via its platform
- Is bi/multi-sided

B. There is no need to revolutionize competition law but some adaptations are required to "make it fit" for the digital economy

The current competition law framework remains relevant with some adjustments

Even though competition law has proven to be flexible to properly address different situations over decades, it now needs to evolve to be adapted to the specificities of the digital economy so as to efficiently and in a timely manner tackle competition problems proper to large digital platforms acting as gatekeepers.

In this context, Orange welcomes the European Commission's initiatives to review the Guidelines on Horizontal Agreements and Vertical Restraints as well as Notice on Market Definition. In addition, the Guidelines on Non-Horizontal Merger and the Communication on the Commission's Enforcement Priorities in Applying Article 102 TFEU should be updated. Also, the Commission should develop new theories of harm adapting them to the digital platform economy and use existing tools, such as interim measures more efficiently.

However, Orange acknowledges that the review of the competition framework has its limits and all the aforementioned structural competition problems might not be possible to tackle under the existing tools. Indeed, in the digital economy it can be quite challenging to define markets and assess dominance, as large digital platforms have distinctive features, are often present across diverse markets and are integrated in an ecosystem linked through common inputs (data, customer base, technical modules, etc.).

This could call for a need to adopt a new intervention instrument targeting the enforcement gaps, meaning the challenge of applying the competition law designed for "traditional" markets to the digital economy and to structural competition problems deriving from large digital platforms.

The New Competition Tool (NCT) proposal would be a significant and disproportionate shift in the competition law doctrine

Any fundamental change to competition law as suggested in the NCT Inception Impact Assessment (IIA) would be a disproportionate and inappropriate reaction to identified structural competition concerns with a risk to modify the burden of proof, procedural safeguards and even render existing tools redundant. It also risks creating legal uncertainty and regulatory overreach across sectors. In addition, it could be questioned whether Articles 103 and 114 TFEU provide an adequate legal basis for such a tool.

More specifically, the proposal targets not only large digital platforms to which structural competition problems relate but includes other situations – including oligopolistic markets - without a solid justification as to the inefficiency of the existing tools for such cases. Indeed, oligopolistic markets are not problematic *per se* as they do not result in inefficient market outcomes by default. Potential competition concerns related to oligopolistic markets are not new and are efficiently addressed under the current framework. Also, oligopolistic markets do not create structural competition problems such as monopolization, gatekeeping or tipping and they do not have most of the features defining large digital platforms.

Furthermore, the proposal puts into question the dominance test which is key in a competition assessment and has only failed for market situations with large digital platforms due to the specificities of these actors.

Additionally, introducing a new tool, with such a large intervention scope, risks sending a negative message to the whole industry as well as impacting EU competitiveness at global level.

Finally, such a tool is redundant with Option 3b as suggested in the IIA on the DSA. Even though the proposed competition tool aims at having a larger reach, the primary intervention scope of both tools remains the digital economy and platforms through similar intervention mechanisms.

Therefore, Orange does not support the introduction of a New Competition Tool based on the policy options proposed in the IIA.

C. Addressing the gaps related to large digital platforms acting as gatekeepers calls for a targeted intervention

Orange believes that a proportionate and efficient set of measures to tackle structural competition problems deriving from large digital platforms acting as gatekeepers could be based on the following approach. Such an approach would ensure a smooth interplay between different measures proposed under the NCT and DSA packages as well as consistent and non-contradictory outcomes.

An ex-ante regulation through a list of prohibited practices

Orange believes that an *ex ante* tool should be introduced through a list of prohibited practices applied to large digital platforms acting as gatekeepers. *Such an ex ante regulation would clarify the rules applied to large digital platforms and forbid certain practices which could be problematic per se when employed by such actors.* This tool, corresponding to Option 3a of the IIA on the DSA, would be enforced at European level.

Such a list of prohibited practices could include self-preferencing, pre-installation of applications and priority screen placements, discriminatory access to platform components, imposition of default settings, *de facto* standards or restrictions on IPR policy, etc. In these cases, the burden of proof would be inversed and the conduct would be forbidden *per se* unless the large digital platform could prove the contrary.

A targeted intervention tool to impose remedies through an extension of DG Competition powers

As a necessary complement to competition law enforcement and to the list of prohibited practices, a more adapted intervention tool targeted to structural competition problems exerted by large digital platforms acting as gatekeepers could be introduced. This tool (corresponding to Option 3b of the IIA on the DSA) should include a case-by-case assessment related to competition problems deriving from large digital platforms acting as gatekeepers and an imposition of tailor-made remedies, when necessary. Under this new intervention, no infringement would be established and no fines would be imposed. To guarantee an overall coherence with the competition doctrine when tackling competition problems proper to large digital platforms, this tool should be introduced through an extension of DG Competition powers.

Possible remedies could refer to imposing neutrality between OS/software and platform services, imposing interoperability (negotiations based on fair terms, unified/open APIs and open sources, personal data portability, etc.), forbidding unfair business practices (tying/bundling, exclusivities, MFN, abusive or unilateral "take it or leave it" conditions, etc.), forbidding leveraging of data/customer base if not replicable and certain practices of third party data accumulation, etc.

This new tool should be applied in exceptional and sufficiently justified situations where Article 102 TFUE is proven not to be efficient to tackle the competition concern in question. There should thus be strict limitations, clear definitions for the intervention scope and conditions.

Orange would only support the introduction of such a tool (corresponding to Option 3b of the IIA on the DSA) through an institutional set-up with DG Competition empowerment.

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