

How Can the New Competition Tool Help Bridge the Gap Between Sustainability and EU Competition Law?

Discussion Paper by the Fair Trade Advocacy Office

The European Commission (“**Commission**”) is expected to adopt, in early December 2020, a legislative proposal for a new competition tool (“**NCT**”), targeted to strengthen competition law enforcement to address structural competition problems that cannot be solved with the existing competition law toolbox. While the Commission did not limit the scope of this initiative to any market at the outset, recent speeches by Executive Vice President Vestager appear to confirm that the NCT will be limited to digital markets:¹ It will be launched alongside the *ex ante* regulatory instrument of very large online platforms acting as gatekeepers, the two instruments together forming the Digital Markets Act (“**DMA**”).

This paper first discusses why, as opposed to a limited sectoral scope, a structure-based NCT with a horizontal scope would make the NCT “future-proof and effective”² and could be an appropriate mechanism to solve various structural competition problems in the agri-food supply chains among other markets that the current competition law framework is unable to address. The second section proposes that an NCT with a digital scope could still help narrow the gap between EU competition law and sustainability. To that end, it highlights various existing and potential structural competition issues in the digital sphere that should not be overlooked when designing the legal framework for the NCT. It also explores the relationship between the NCT and the *ex ante* regulatory mechanism.

I. Setting the Scope of the NCT

Details are slowly emerging on the Commission’s legislative proposal for what is now called the DMA, which seems to be separate from the Digital Services Act that the *ex ante* regulatory tool was initially going to be a part of. EVP Vestager announced that the DMA will have two pillars: the *ex ante* regulatory instrument, which will “be a clear list of dos and don’ts for big digital gatekeepers, based on our experience with the sorts of behaviour that can stop markets working well”, and the NCT, “a harmonised market investigation framework” that would allow the Commission to “investigate certain structural problems in digital markets.”³

This narrowed scope of the NCT is at odds with the [Inception Impact Assessment on the NCT](#) (“**NCT Impact Assessment**”) that was published on 2 June 2020, the results of the

¹ [Speech by Executive Vice-President Margrethe Vestager: Building trust in technology](#) dated 29 October 2020; [speech at the Fordham Competition Conference](#) dated 8 October 2020. See also <https://www.politico.eu/article/margrethe-vestager-brussels-seeks-to-strengthen-competition-tool-against-big-tech-digital-services-act/>

² [Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool](#), p 8

³ [Speech by Executive Vice-President Margrethe Vestager: Building trust in technology](#) dated 29 October 2020

[public consultation on the NCT](#) that was open between 2 June-8 September 2020, as well as the National Competition Authorities’ (“**NCAs**”) [contributions to the public consultation](#).

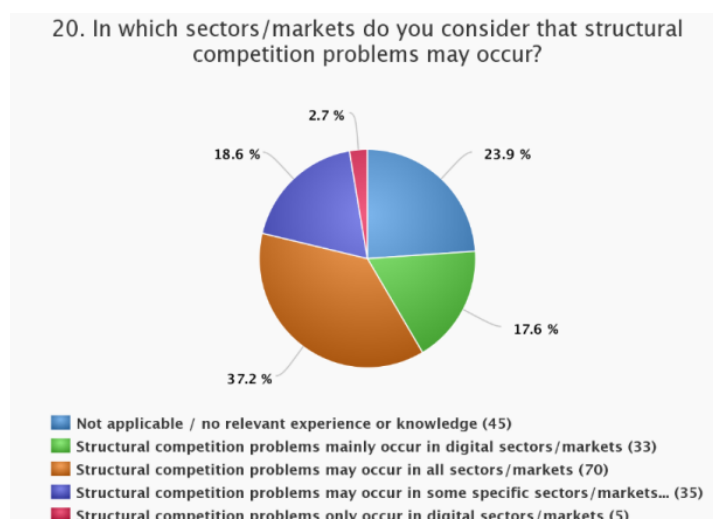
First off, the NCT Impact Assessment had not limited the scope of the NCT to any market and set out four potential options as summarised in the table below. The key questions regarding the scope of the tool were whether it would be sectorally limited and whether it would apply only to unilateral conduct by a dominant undertaking or to structural competition issues in general. Options 1 and 3 would not be limited to any specific sectors (ie horizontal), but Option 1 would be limited to unilateral conduct by dominant undertakings. Option 3 would not require a finding of dominance and could address all structural competition issues. Options 2 and 4 would be limited in scope to one or few sectors. Similar to Option 1, Option 2 would require a finding of dominance, whereas Option 4 would be horizontal in scope similar to Option 3. Therefore, overall, Option 3 would have the broadest scope.

Table 1: The different options for the NCT

	Horizontal	Sectoral (e.g. digital)
Structure-based (e.g. tipping or oligopolistic markets)	Option 3	Option 4
Dominance-based (but without requirement to show abuse)	Option 1	Option 2

Source: “Interplay between the New Competition Tool and Sector-Specific Regulation in the EU”, Expert study prepared by de Streeck and Larouche

The contributions to the public consultation demonstrated that the overwhelming majority of the contributors who expressed a position on sectors concerned by structural competition problems indicated that structural problems were not limited to digital markets and the respondents favoured Option 3 overall.⁴



Source: Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool

⁴ [Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool](#), p 18

Other sectors in which the respondents found structural competition problems included agri-food, biotech, digital, energy, financial services, healthcare/pharmaceuticals, hospitality, industrial products, journalism, liner shipping, manufacturing, media, real estate, telecommunications or other utilities, and transport. Some respondents found that a horizontal scope would make the NCT “future-proof and effective”.⁵ The public consultation also showed that “NCAs with relevant experience generally consider that such a new competition tool should be applicable to all markets and not be limited to markets/sectors affected by digitisation.”⁶ In a similar vein, it is indicated in the NCT Impact Assessment that the “likely social impact [of Options 1, 2 and 4] is expected to be of a lesser degree, either by nature of their limited scope or their dominance-based enforceability.”⁷

Notably, in a communication to members of some of its advisory groups, the Commission’s Directorate-General for Agriculture and Rural Development (DG AGRI) had also highlighted potential cases in which the NCT could be used to address structural competition issues, going beyond a finding of dominance as well as digital markets: “scenarios that the tool could possibly try to tackle in the agricultural and food sector could be oligopolistic market structures with tacit collusion in upstream input or downstream distribution markets, anti-competitive strategies to monopolise a particular input or where a distribution platform becomes a gatekeeper for farming products, resulting in inefficient market outcomes in terms of higher prices, lower quality, less choice and innovation.”⁸

Furthermore, the Commission sought expert advice for the NCT Impact Assessment and two expert studies out of four included the experts’ positions on the scope of the tool.⁹ Both studies cautioned against a sectoral limitation of the scope of the NCT and opted for Option 3. According to Motta and Peitz, while “some types of harm might be of particular concern in digital markets, an artificial limitation of the scope of the New Competition Tool to digital industries would also appear to be an inferior option (not to mention the difficulties and possible arbitrariness in defining what is digital and what is not)”.¹⁰ Indeed, the traditional economy and digital markets are more and more intertwined; therefore, it is becoming increasingly difficult to draw the line between digital and non-digital, as the Commission also highlighted.¹¹ The Court of Justice of the EU’s (“**CJEU**”) 2017 decision on Uber is a case in point:¹² The CJEU classified Uber as “a service in the field of transport”, as opposed to an

⁵ Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool, p 8

⁶ Summary of the contributions of the National Competition Authorities to the impact assessment of the new competition tool, p 9.

⁷ NCT Impact Assessment, p 4

⁸ Information exchange between DG AGRI Unit G1 and the members of one of its advisory groups

⁹ “Interplay between the New Competition Tool and Sector-Specific Regulation in the EU”, Expert study prepared by de Streel and Larouche; “Intervention triggers and underlying theories of harm”, Expert study prepared by Motta and Peitz.

¹⁰ Motta and Peitz, p 5. This last point is also mentioned in the Summary of the contributions of the National Competition Authorities to the impact assessment of the new competition tool (p 9).

¹¹ NCT Impact Assessment, p 4

¹² Judgment in Case C-434/15 - *Asociación Profesional Elite Taxi v Uber Systems Spain SL* (20 December 2017)

information society service.¹³ The foregoing raises the question whether the NCT could be meaningfully limited to a certain sector or a few sectors, and whether the “digital” scope would gradually have to expand as more and more markets become digitised.

In view of the foregoing, if Option 3 were to be selected, the NCT could indeed be an appropriate mechanism to address various structural competition problems that the current competition law framework is unable to address, such as:

- **Buyer power**

Concentration of buyer power, especially at the distribution and retail levels, is widespread in agri-food supply chains, among others. Furthermore, oligopolistic market structures at the buyer level are prone to tacit collusion/conscious parallelism (further discussed below). The result is that the producers, especially smaller ones, have *de facto* only one or few buyers to sell their products to and in general, power relations between small producers and buyers are asymmetrical.¹⁴ Purchasing alliances, primarily known from the retail sector, also consolidate economic activity on the basis of contracts or factual cooperation, rather than mergers.¹⁵

The current competition law framework does not fully address these problems, partially due to the fact that the downward pressure on prices emanating from buyer power is sometimes considered beneficial insofar as the cost savings are passed on to consumers. However, it is not always true that the benefits are passed on to the consumer, and buyer power is capable of forcing smaller suppliers out of the market.¹⁶ Purchasing alliances have not been off the radar in the EU and have been investigated by several NCAs.¹⁷ However, the assessment of the upstream impact of purchasing alliances on the producers has arguably been limited.¹⁸ These effects do not necessarily arise from unfair trading practices (“**UTP**”)

¹³ For the sake of completeness, the current EU regulatory framework in digital services, based on the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market) is no longer fit to address the digital landscape that has greatly changed in the past 20 years since the E-Commerce Directive was adopted. In parallel to the DMA, the Digital Services Act “will update the E-Commerce Directive, and require digital services to take more responsibility for dealing with illegal content and dangerous products.” ([Speech by Executive Vice-President Margrethe Vestager: Building trust in technology](#) dated 29 October 2020).

¹⁴ V Nelson, O Martin-Ortega and M Flint, “Making Human Rights Due Diligence Work: An Analysis of Impact and Legal Options” (2020) University of Greenwich Report commissioned by the FTAO and Brot für die Welt; Chatham: UK, p 40.

¹⁵ See L Colen, Z Bouamra-Mechemache, V Daskalova, V and K Nes (2020) “Retail alliances in the agricultural and food supply chain”, JRC Technical Reports JRC120271, Luxembourg: Publications Office of the European Union
https://publications.jrc.ec.europa.eu/repository/bitstream/JRC120271/jrc120271_report_retail_alliances_final_pubsy_09052020.pdf

¹⁶ Olivier De Schutter, “Addressing Concentration in Food Supply Chains: The Role of Competition Law in Tackling the Abuse of Buyer Power” (2010) UN Special Rapporteur on the Right to Food, Briefing Note 03, p 2.

¹⁷ *ibid*, p 53; See also FTAO “[EU Competition Law and Sustainability in Food Systems - Addressing the Broken Links](#)” (Brussels, February 2019), pp 27-31 (“**Addressing the Broken Links**”), p 26.

¹⁸ Colen et al, p 2.

which are covered by the UTP Directive. For example, if the cost of compliance with private standards on hygiene, food safety and traceability in Europe is passed on to farmers in the global south, this runs the risk of shifting food production from smallholders to large farms.¹⁹ Finally, the UTP Directive applies only to agricultural supply chains, whereas similar power imbalances exist in other sectors as well, notably textile supply chains.²⁰ In the long term, such structural changes in supply chains are capable of having negative effects on the relevant sector overall, including the end consumers.

- ***Vertical integration or the control of the agricultural products supply chains through other means***

Various supply chains have historically been prone to vertical integration. For example, given the perishable nature of the banana, its trade has been historically dominated by vertically integrated companies that controlled production, packing, shipping, import and sometimes even ripening. There are also more recent practices that provide international players with the ability to vertically control parts of or entire supply chains. For example, contract farming arrangements, ie agreements “between farmers and processing and/or marketing firms for the production and supply of agricultural products under forward agreements, frequently at predetermined prices”²¹ are spreading, and their claimed benefits for small farmers especially those outside the EU remain ambiguous.²² The growing concentration in the agrochemical market and the interlinkage between pesticide suppliers and seeds suppliers is another example. Finally, common ownership by the same financial actors who operate as shareholders in different undertakings along the same value chain is another recent trend which raises concerns in terms of the “possibility of coordinating prices and squeezing value away from any other level of the chain”.²³

- ***Oligopolistic market structures***

The agri-food supply chain exhibits oligopolistic market structures across the chain, partially due to the recent wave of global mergers.²⁴ As a result, small farmers are locked into not just a few buyers, but also fewer input suppliers.²⁵ Furthermore, retail oligopolies

¹⁹ Addressing the Broken Links, p 24.

²⁰ Nelson et al.

²¹ <http://www.fao.org/3/y0937e/y0937e02.htm>

²² E Meemken and MF Bellemare, “Smallholder farmers and contract farming in developing countries” (2020) 117 PNAS 259-264.

²³ Addressing the Broken Links, p 33.

²⁴ See IPES-Food, Too Big to Feed – Exploring the impacts of mega-mergers, consolidation and concentration of power in the agri-food sector (2017), p 16 http://www.ipes-food.org/_img/upload/files/Concentration_FullReport.pdf

²⁵ I Lianos and D Katalovsky, “Merger Activity in the Factors of Production Segments of the Food Value Chain: A Critical Assessment of the Bayer/Monsanto merger”, Centre for Law, Economics and Society Policy Paper Series 2017/1, p 11 <https://www.ucl.ac.uk/cles/sites/cles/files/cles-policy-paper-1-2017.pdf>

also pose structural competition issues both vis-à-vis the suppliers and the end consumers.²⁶ As noted by SOMO:²⁷

Supermarkets in Europe have a powerful position in the food supply chain because they are often the single most important food retail outlet. In 11 different European countries, fewer than eight retail chains control the vast majority of the nation's food retail. For example, five retailers make up 85 per cent of the German market in 2014 and 77 per cent of the Dutch market in 2016. Retail is also continuously concentrating in most European countries. Retailers have a powerful influence over which food products are sold and at what price, since producers and suppliers are highly dependent on supermarkets to sell their products.

- **Growing information asymmetries**

As the complexity of value chains increases, the information asymmetry on the customers' side is also accentuated, ie it becomes more difficult for costumers to obtain trustworthy information about the goods they are purchasing, particularly when it comes to the environmental and social conditions in which they have been produced. The textile value chain is a clear example: often, even large brands do not have any knowledge of exactly which factories their garments come from due to sub-contracting among factories, or the textile used in their garments.²⁸

To conclude, based on the foregoing, a *structure-based* new complementary tool with a *horizontal scope* is needed in EU competition law to solve structural competition issues that the existing toolbox is unable to address; therefore, it is still a mystery why the Commission is opting to narrow down the scope of the NCT to digital markets. That said, the Commission's DMA legislative proposal will pass through the ordinary legislative procedure and requires the approvals of the European Council and the European Parliament. In this context, Member States' preference over the scope of the tool will also be revealed, which might go beyond digital markets.

II. **NCT in the Digital Sphere**

As mentioned at the outset, according to EVP Vestager, the NCT is intended to give the Commission the power to address "new situations, where digitisation creates deep, structural failures in the way our markets work" at this stage.²⁹ However, beyond the

²⁶ Note by the UNCTAD Secretariat, "Enforcement of competition policy in the retail sector: Competition issues in the food retail chain" (2016) p3, https://unctad.org/system/files/official-document/ciclpd38_en.pdf

²⁷ SOMO Paper, "Eyes on the price – International supermarket buying groups in Europe" (March 2017) p 1 (footnotes omitted) <https://www.somo.nl/wp-content/uploads/2017/03/Eyes-on-the-price.pdf>

²⁸ L Indvik, "Does Sustainable Fashion Exist?" (FT, 14-15 November 2020).

²⁹ [Speech by Executive Vice-President Margrethe Vestager: Building trust in technology](#) dated 29 October 2020.

“digital”, its scope is far from clear.³⁰ Based on what is revealed so far regarding the DMA, the *ex ante* regulatory tool will target gatekeepers, whereas the NCT can intervene to stop an entity from becoming a gatekeeper (“stop those emerging gatekeepers”, as EVP Vestager mentioned).³¹ Therefore, the application of the NCT does not seem to presuppose an existing gatekeeper. When considered in its wider context which reflects a broad understanding of “digital” that covers the development, marketing and the use of digital technologies, products and services³², the NCT can still be an effective tool in addressing structural competition issues across markets that would also help achieve the EU’s sustainability goals. To that end, the FTAO flags four immanent issues that must be taken into consideration in designing the NCT legal framework:

- ***Extensive processing of farmers’ data***

As flagged by IPES-Food while several mega-mergers were underway in the agri-food sector, with the rise of digital agriculture, seed and pesticide companies hold increasing amounts of data on soil, weather and crop yields.³³ This is partially due to the acquisitions of digital agriculture startups by larger conglomerates. As the Bayer/Monsanto merger has shown, the parties had built their digital agriculture divisions mainly through acquisitions.³⁴ The Commission even observed that Bayer’s entry into digital agriculture appeared to be “part of a defensive strategy” driven by “the anticipated disruptive negative effect of digital agriculture on its core crop protection product business.”³⁵ Machinery companies also heavily rely on digital tools such as remote sensing, aerial imaging and wireless data servers to collect data. Farmers lie at the heart of this production of agricultural data. Moreover, as the agritech startup scene thrives, partially due to investor interest during the Covid-19 pandemic³⁶, there is evidence that agri-food conglomerates have also been investing in agritech startups³⁷, or try to engage in partnerships with agritech startups.³⁸ The combination of these practices, coupled with the power imbalances in global supply chains, are capable of giving rise to gatekeepers of agricultural data, and could lead to highly consolidated offerings to farmers not just in terms of input but also machinery.³⁹

³⁰ <http://competitionlawblog.kluwercompetitionlaw.com/2020/10/30/commissions-new-tools-for-policing-digital-markets-are-shaping-up-gradually-but-slowly/>

³¹ [Speech by Executive Vice-President Margrethe Vestager: Building trust in technology](#) dated 29 October 2020

³² See “Shaping Europe’s digital future”, which states, as one of the Commission’s objectives “**A fair and competitive economy:** A frictionless single market, where companies of all sizes and in any sector can compete on equal terms, and can develop, market and use digital technologies, products and services at a scale that boosts their productivity and global competitiveness, and consumers can be confident that their rights are respected.”

³³ IPES-Food, pp 33-34, 62-64.

³⁴ Case M.8084 – Bayer/Monsanto (21 March 2018). See eg paras 2473, 2479, 2526, 2531.

³⁵ *ibid*, para 2532.

³⁶ C Hall, “[Sustainable Food Supply Chain Begins With Startups On The Farm](#)” (Crunchbase News, 28 October 2020)

³⁷ Eg Nutrien’s investment in Taranis <https://techcrunch.com/2018/11/06/precision-farming-startup-taranis-gets-20m-series-b-for-its-crop-monitoring-tech/>

³⁸ See eg “Bayer ends digital farming agreement after Twitter backlash” (*FT*, 16 February 2020) <https://www.ft.com/content/b8ca7480-50b9-11ea-8841-482eed0038b1>

³⁹ See IPES-Food, pp 33-34, 62-64.

- **Algorithmic price-setting**

Algorithms increasingly serve as the basis upon which products are tracked and distributed, consumer behaviour is analysed, and competitors' behaviour is monitored in the agri-food sector. This trend goes hand in hand with the rise of digital agriculture. Technologies linked to algorithmic pricing could also be potentially used to set the terms of purchases in the future in the agri-food sector, exacerbating the buyer power of large downstream players (discussed under Section I above). Price prediction algorithms for crops are already on the rise.⁴⁰ Despite their claimed benefits for farmers, large buyers are potentially better placed to make a widespread use of the technology, which offers them yet one more advantage vis-à-vis smaller players, and in particular smaller producers and suppliers who are *de facto* left with no other option than to accept the purchasing conditions imposed by the buyers. Coupled with the precision farming techniques, the use of pricing algorithms could also result in a reduction in crop varieties if buyers shift their purchases to more profitable crops. Another possible scenario is if a retailer purchasing food commodities, like cocoa, started using algorithms to monitor the behaviour of their competitors, leading *de facto* to a situation comparable to a monopsony, which would negatively impact smaller producers. This could function as a downward pressure on purchase prices and given the high-risk of environmental and human rights abuses in the sector, further deteriorate the living and working conditions of farmers.

Moreover, the general competition law concerns over algorithmic sales price-setting are particularly relevant in the agri-food sector. The Commission had highlighted in the NCT Impact Assessment that the NCT could address “oligopolistic market structures with an increased risk for tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions (which are becoming increasingly prevalent across sectors)”.⁴¹ Indeed, the retail grocery sector in Europe is increasingly concentrated as discussed above. Furthermore, algorithmic pricing practices are already implemented in the grocery sector, both in-store and online.⁴²

- **Labour issues in the sphere of physical services integrated in digital platforms**

The NCT could be used to address labour market issues when physical services are provided through the use of digital platforms. For example, predatory hiring practices when a ride hailing platform expands into a new geography or service (like food delivery), followed by a downward pressure on the working conditions of the platform workers, can be addressed with the NCT. It should be noted in particular that over the past 30 years there has been a remarkable growth in the number of atypical labour relationships, which involve various forms of false self-employment, labour hire through agencies, and more recently, gig work.

⁴⁰ See eg N Kantanatha, N Serban and P Griffin, “Yield and Price Forecasting for Stochastic Crop Decision Planning” (2010) 15 *Journal of Agricultural, Biological, and Environmental Statistics* 362-380.

⁴¹ NCT Impact Assessment, p 2.

⁴² See eg <https://www.theguardian.com/technology/2017/jun/04/surge-pricing-comes-to-the-supermarket-dynamic-personal-data>

These are also the workers most affected by the current Covid-19 crisis.⁴³ This rise in atypical labour relationships has been coupled by dwindling union membership, a growing disparity in power between labour and capital, and a diminishing share of labour in the gains of capital. Empirical evidence from the US suggests the need to revisit the classical assumption that labour markets are sufficiently competitive; in fact, the studies suggest that labour market concentration is widespread and that monopsony is much more plausible than previously thought.⁴⁴ Against this backdrop of research, US agencies have shown a willingness to intervene against anti-competitive restraints affecting the mobility of workers (eg no poaching agreements) and have recognized the problems of labour monopsony.⁴⁵ By contrast, in the EU, there has been limited attempts to study these developments, notwithstanding an inquiry into platform work published in 2019.⁴⁶ There is also limited evidence of proactive application of the competition rules to protect workers from power abuse, from employer anti-competitive agreements, or from mergers likely to create a monopsony in the human resource/labour market, despite suggestions from the literature.⁴⁷

- **NCT and the ex ante regulatory mechanism**

The *ex ante* regulatory mechanism could also come into play to address issues at the crossroads of sustainability and EU competition law. The concept of “gatekeeper platform” is arguably open to bringing together separate regulatory authorities. This conciliation could cover not only issues of data protection but other sustainability issues (labour, environment). In the application of the *ex ante* tool, there can be cooperation between DG COMP and, for example, DG AGRI, DG EMPL and DG ENV. On the other hand, the distinction needs to be clear between the NCT and the *ex ante* regulatory tool – which may not be clear at this stage⁴⁸ – to enable stakeholders to understand which tool is better suited for which scenario.

⁴³ See OECD Employment Outlook 2020, https://www.oecd-ilibrary.org/sites/1686c758-en/1/3/1/index.html?itemId=/content/publication/1686c758-en&_csp=fc80786ea6a3a7b4628d3f05b1e2e5d7&itemIGO=oecd&itemContentType=book#section-d1e912

⁴⁴ See eg J Azar, I Marinescu, MI Steinbaum and B Taska, “Concentration in US Labor Markets: Evidence from Online Vacancy Data” (2018) IZA Institute of Labor Economics, Discussion Paper Series No. 11379 <http://ftp.iza.org/dp11379.pdf>; A Dube, J Jacobs, S Naidu and S Suri, “Monopsony in Online Labor Markets” (2020) 2 American Economic Review: Insights, 33-46.

⁴⁵ US Department of Justice and US Federal Trade Commission (2016) “Antitrust Guidance for Human Resource Professionals” <https://www.justice.gov/atr/file/903511/download>; US Department of the Treasury (2016) “Non-compete Contracts: Economic Effects and Policy Implications” <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>; US White House (2016) “Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses” https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf

⁴⁶ CEPS, EFTHEIA, and HIVA-KU Leuven “Study to gather evidence on the working conditions of platform workers, Final Report VT/2018/032” (2019) Report prepared for the European Commission.

⁴⁷ VI Daskalova, “Regulating the New Self-Employed in the Uber-Economy: What Role for EU Competition Law” (2018) 19 German Law Journal, 461-508.

⁴⁸ See EVP Vestager’s address of 12 November 2020 to the European Parliament Committee on Industry, Research and Energy https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy_20201112-1645-COMMITTEE-ITRE_vd

Regarding the *ex ante* regulatory mechanism, the threshold on what and who are the gatekeepers will be decisive in setting the boundaries of its application. From a social sustainability perspective, various gig economy platforms such as Uber or food delivery platforms could also be considered gatekeepers and imposed dos and don'ts with the *ex ante* regulatory tool. Such obligations could include a ban on measures that limit switching/multihoming by the service provider users of the platform, how much data is transferred from the service provider to the platform, or rating portability across different platforms. From an environmental sustainability perspective, agricultural companies are not traditionally considered to operate in the digital sphere. However, as mentioned above, the rise of digital agriculture and the collection of vast amounts of agricultural data by conglomerates could in turn mean that they eventually become “gatekeeper platforms” (if not stopped beforehand, possibly through the use of the NCT).

Conclusion

As this paper sets out, a structure-based NCT with a horizontal scope, as opposed to one with sectoral limitations, would make the NCT “future-proof and effective” and could be an appropriate mechanism to solve various structural competition problems in the agri-food supply chains among other markets that the current competition law framework is unable to address. These issues include the power imbalances, vertical integration, oligopolistic market structures and information asymmetries in global supply chains, as well as structural competition issues in the retail grocery sector. However, an NCT with a digital scope could still help narrow the gap between EU competition law and sustainability. To that end, the NCT legal framework should not overlook the rise of digital agriculture which entails excessive processing of farmers’ data as well as algorithmic price-fixing in global supply chains, and labour issues occurring in the sphere of physical services integrated in digital platforms. Furthermore, the relationship between the NCT and the *ex ante* regulatory mechanism must be clear to enable stakeholders to understand which tool will be applicable in different scenarios especially in relation to digital agriculture and labour issues in the digital sphere.

This paper was written in collaboration with Ayse Gizem Yasar. It also reflects the discussion at the FTAO Workshop of 27 October 2020 on the European Commission’s Call for Contributions on Competition Policy Supporting the Green Deal, which was held with the participation of other civil society organisations, academics and practitioners. We thank the participants for the fruitful discussion and invite all stakeholders to join the debate.